Clerk's Stamp:

ENT

COURT FILE NUMBER	2203 19336
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	EDMONTON
PLAINTIFFS	**MIKE PRIESTNER REAL ESTATE INC. and MPRE GP DEV INC.**
DEFENDANTS	**2399430 ALBERTA LTD., 2399449 ALBERTA LTD., TURNIP HOMES INC., and HENOK KASSAYE**
DOCUMENT	**BENCH BRIEF OF MIKE PRIESTNER REAL ESTATE INC. AND MPRE GP DEV INC. IN SUPPORT OF AN APPLICATION FOR A RECEIVERSHIP ORDER**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

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I. INTRODUCTION

1. The Defendant, 2399430 Alberta Ltd. ("**430**"), is indebted to Mike Priestner Real Estate Inc. ("**Priestner**") pursuant to a vendor takeback mortgage in the amount of $5,555,818.81 as at November 30, 2022. The sole director and controlling mind of 430 is the Defendant, Henok Kassaye ("**Kassaye**"). 430's indebtedness to Priestner is secured by a mortgage of certain lands on Jasper Avenue in Edmonton, Alberta.

2. The Defendant, 2399449 Alberta Ltd. ("**449**"), is indebted to MPRE GP Dev Inc. ("**GP**") pursuant to a vendor takeback mortgage in the amount of $10,748,998.51 as at November 30, 2022. Kassaye is also the sole director and controlling mind of 449. 449's indebtedness to GP is secured by a mortgage of certain lands on 109 Street, Saskatchewan Drive, and 81 Avenue in Edmonton, Alberta.

3. Kassaye has guaranteed repayment of all indebtedness of 430 to Priestner, and has guaranteed repayment of all indebtedness of 449 to GP.

4. Priestner is the sole shareholder of GP, and Priestner and GP are related entities. The management of Priestner and GP have been administering the indebtedness of 430 and 449 conjunctively.

5. The security granted by 430 and 449 allows for and provides for the appointment of a receiver or receiver and manager in the event of default with respect to 430 and 449's respective obligations to Priestner and GP.

6. 430 and 449 are in default of their respective obligations to Priestner and GP, in failing to pay the amounts due and owing under the mortgages, and by failing to pay the property taxes assessed against the mortgaged lands.

7. On or about November 25, 2022, Priestner demanded payment of all amounts owing from 430 and did serve a Notice of Intention to Enforce Security pursuant to section 244 of the *Bankruptcy and Insolvency Act,* RSC 1985, c B-3 (the "***BIA***"). 430 has failed to repay its indebtedness to Priestner.

8. On or about November 25, 2022, GP demanded payment of all amounts owing from 449 and did serve a Notice of Intention to Enforce Security pursuant to section 244 of the *BIA*. 449 has failed to repay its indebtedness to GP.

9. Since the origination of the indebtedness, 430 and 449 have generally failed to pay the amounts due and owing to Priestner and GP, resulting in significant mortgage arrears. Priestner and GP have attempted to reach a resolution with 430 and 449 to catch up the arrears, but Priestner and GP's patience has now been exhausted. Priestner and GP have significant concerns regarding Kassaye's ability to manage and operate 430 and 449, given the inability to make payments to Priestner and GP, and 430 and 449's decision to allow interest and penalties to accrue on unpaid municipal taxes. Priestner and GP worry that 430 and 449 will not be able to maintain the mortgaged properties through the winter, and generally, putting Priestner and GP's collateral at significant risk, while arrears continue to accrue at a significant rate. Priestner and GP are not comfortable with Kassaye operating the mortgaged properties through a liquidating process, and do not believe 430 and 449 can obtain re-financing promptly, or at all, to satisfy the indebtedness.

10. Priestner and GP respectfully submit that, having regard to the circumstances, it is just and convenient to appoint a Receiver of the assets, undertaking, and property of 430 and 449, and that MNP Ltd. ("**MNP**") ought to be appointed as Receiver immediately, given the nature of the property and the reasons set out herein.

II. ISSUES

11. Priestner and GP respectfully submit that the issues before this Honourable Court are:

    (a) Should a Receiver be appointed by this Honourable Court in the present circumstances?

    (b) If this Honourable Court exercises its discretion to appoint a Receiver, what firm ought to be appointed as Receiver?

III. FACTUAL BACKGROUND

12. Pursuant to a Purchase and Sale Agreement and Mortgage, 430 borrowed money from Priestner, which 430 agreed to pay to Priestner with interest. 430 is indebted to Priestner in the amount of $5,555,818.81 as at November 30, 2022, plus interest thereon and thereafter at the rate of 4.50% per annum above the prime rate of interest maintained by Royal Bank of Canada from time to time ("**Prime**"), plus costs on a solicitor and his own client basis.

Affidavit of Christopher Burrows sworn December 6, 2022 (the "**Burrows Affidavit**") at paragraphs 7 - 9 and Exhibits D and E

13. Concurrently, pursuant to a Purchase and Sale Agreement and Mortgage, 449 borrowed money from GP, which 449 agreed to pay to GP with interest. 449 is indebted to GP in the amount of $10,748,998.51 as at November 30, 2022, plus interest thereon and thereafter at the rate of 4.50% per annum above Prime, plus costs on a solicitor and his own client basis.

Burrows Affidavit at paragraphs 10 - 12 and Exhibits F and G

14. Kassaye is the sole director of 430 and 449.

Burrows Affidavit at Exhibits "A" and "B"

15. Pursuant to a Mortgage dated January 27, 2022 (the "**430 Mortgage**"), registered at the Land Titles Office as registration 222 105 237, 430 granted to Priestner a mortgage as security for all of 430's indebtedness to Priestner in the principal amount of $5,218,904.00, plus interest, plus costs on a solicitor and his own client basis, over real property legally described as:

    PLAN F
    LOT 6

    (the "**Jasper Avenue Lands**")

Burrows Affidavit at paragraphs 21 - 22 and Exhibits L and M

16. Pursuant to the 430 Mortgage, 430 agreed that upon an event of default of 430's obligations to Priestner, Priestner would be entitled to, among other things, apply for the appointment of a receiver or a receiver and manager of 430.

Burrows Affidavit at paragraph 48 and Exhibit M

17. Pursuant to a Mortgage dated January 27, 2022 (the "**449 Mortgage**"), registered at the Land Titles Office as registration 222 128 556, 449 granted to GP a mortgage as security for all of 449's indebtedness to GP in the principal amount of $10,106,096.00, plus interest, plus costs on a solicitor and his own client basis, over real property legally described as:

PLAN B2
BLOCK 8
LOTS 115 TO 117 INCLUSIVE
EXCEPTING THEREOUT ALL MINES AND MINERALS

(the "**109 Street Lands**")

PLAN I2
BLOCK 103
LOT 6

(the "**Saskatchewan Drive Lands**")

DESCRIPTIVE PLAN 9220734
BLOCK 48
LOT 1A
EXCEPTING THEREOUT ALL MINES AND MINERALS

(the "**81 Avenue Lands**")

Burrows Affidavit at paragraphs 23 - 24 and Exhibits N and O

18. Pursuant to the 449 Mortgage, 449 agreed that upon an event of default of 449's obligations to GP, GP would be entitled to, among other things, apply for the appointment of a receiver or a receiver and manager of 449.

Burrows Affidavit at paragraph 49 and Exhibit O

Issues and Concerns regarding the Security

19. 430 is in default of its obligations to Priestner by, among other things, failing to pay amounts owing to 430 as required pursuant to the 430 Mortgage, and failing to pay municipal tax arrears assessed by the City of Edmonton against the Jasper Avenue Lands. All amounts secured by the 430 Mortgage are due and owing.

Burrows Affidavit at paragraphs 25 - 26 and Exhibit P

20. On or about November 25, 2022, Priestner demanded repayment of all amounts owing from 430 to Priestner, but 430 has failed or neglected and continues to fail or neglect to repay Priestner.

Concurrent with the with the issuance of the demand for payment, Priestner did serve on 430 a Notice of Intention to Enforce Security pursuant to section 244 of the *BIA*.

Burrows Affidavit at paragraph 27 and Exhibits Q

21. 449 is in default of its obligations to GP by, among other things, failing to pay amounts owing to 449 as required pursuant to the 449 Mortgage, and failing to pay municipal tax arrears assessed by the City of Edmonton against the 109 Street Lands, Saskatchewan Drive Lands, and 81 Avenue Lands. All amounts secured by the 449 Mortgage are due and owing.

Burrows Affidavit at paragraphs 28 – 31 and Exhibits R, S, and T

22. On or about November 25, 2022, GP demanded repayment of all amounts owing from 449 to GP, but 449 has failed or neglected and continues to fail or neglect to repay GP. Concurrent with the with the issuance of the demand for payment, GP did serve on 449 a Notice of Intention to Enforce Security pursuant to section 244 of the *BIA*.

Burrows Affidavit at paragraph 32 and Exhibit U

23. Priestner and GP have material concerns regarding the status, stability, and preservation of its security. In particular:

a) since the granting of the 430 Mortgage and 449 Mortgage, 430 and 449 have made a single global payment of $140,000.00 on July 20, 2022, resulting in significant mortgage arrears accruing;

Burrows Affidavit at paragraph 41

b) Priestner and GP have lost confidence in the ability and management of 430 and 449 to continue to operate their respective businesses or repay their respective indebtedness to Priestner and GP. Priestner and GP have provided 430 and 449 with sufficient time to reach a resolution, but Priestner and GP's patience has now been exhausted;

Burrows Affidavit at paragraph 42

c) the outstanding tax arrears and penalties evidence 430 and 449's inability to cover basic operating expenses;

Burrows Affidavit at paragraph 43

d) 430 and 449 have failed to provide documentary evidence that the utilities are being maintained, and Priestner and GP are concerned if the utilities will be maintained when 430 and 449 cannot cover basic operating expenses;

Burrows Affidavit at paragraph 44

e) a Certificate of Lis Pendens has been registered against the mortgage lands, and Priestner and GP have concerns over the impact of the Certificate of Lis Pendens on 430 and 449's ability to liquidate assets or obtain re-financing as a means of repaying the indebtedness to Priestner and GP;

Burrows Affidavit at paragraph 45

f) the indebtedness of 430 to Priestner and 449 to GP is significant, in a cumulative amount exceeding $16,000,000.00.

Burrows Affidavit at paragraphs 46 - 47

IV. LAW AND ARGUMENT

A. Should a Receiver be appointed by this Honourable Court in the present circumstances?

24. Each of section 243 of the *BIA*; section 49 of the *Law of Property Act*, RSA 2000, c L-2; and section 13(2) of the *Judicature Act*, RSA 2000 c J-2 vest in this Honourable Court authority to appoint a Receiver where it is just and convenient to do so.

Bankruptcy and Insolvency Act, RSC 1985, c B-3, s 243 **[TAB 1]**

Law of Property Act, RSA 2000, c L-7, s 49 **[TAB 2**]

Judicature Act, RSA 2000, c J-2, s 13(2) **[TAB 3]**

25. In Priestner and GP's respectful submission, this Honourable Court should exercise its discretion to appoint a Receiver, as it is just, convenient and generally appropriate that a Receiver of the undertaking, property and assets of 430 and 449 be appointed at this time.

26. Priestner and GP respectfully submit that the oft-cited factors set out in *Paragon Capital Corporation Ltd. v. Merchants & Traders Assurance Co.*, 2002 ABQB 430 ("***Paragon***"), weigh in favour of the appointment of a Receiver, which factors are as follows:

> a) whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed, particularly where the appointment of a receiver is authorized by the security documentation;
>
> b) the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets while litigation takes place;
>
> c) the nature of the property;
>
> d) the apprehended or actual waste of the debtor's assets;
>
> e) the preservation and protection of the property pending judicial resolution;
>
> f) the balance of convenience to the parties;
>
> g) the fact that the creditor has the right to appoint a receiver under the documentation provided for the loan;

h) the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulty with the debtor and others;

i) the principle that the appointment of a receiver is extraordinary relief which should be granted cautiously and sparingly;

j) the consideration of whether a court appointment is necessary to enable the receiver to carry out its' duties more efficiently;

k) the effect of the order upon the parties;

l) the conduct of the parties;

m) the length of time that a receiver may be in place;

n) the cost to the parties;

o) the likelihood of maximizing return to the parties;

p) the goal of facilitating the duties of the receiver.

Paragon Capital Corporation Ltd. v. Merchants & Traders Assurance Co., 2002 ABQB 430 at para 27 **[TAB 4**]

See also, *Lindsey Estate v. Strategic Metals Corp.*, 2010 ABQB 242 at para. 32 aff'd by 2010 ABCA 191 [**TAB 5**] and *Schendel Management Ltd., Re*, 2019 ABQB 545 at para 44 [**TAB 6**].

27. Having regard to the above factors listed by Justice Romaine, and to the contents of the Affidavit of Christopher Burrows, Priestner and GP note that, with respect to 430 and 449:

a) the security documents granted by 430 and 449 authorize the appointment of a receiver, and therefore it is not essential for Priestner and GP to establish irreparable harm if a receiver is not appointed;

b) the risk to Priestner is significant, with the indebtedness of 430 exceeding $5,555,818.81 and the risk to GP is significant, with the indebtedness of 449 exceeding $10,748,998.51;

c) the collateral comprises of four, highly valuable commercial properties in Edmonton. The properties are likely to be difficult to sell, with a limited number of interested purchasers. Priestner and GP are advised by counsel for the Defendants that some, but not all, of the buildings are presently vacant, and Priestner and GP believe the property will need significant and diligent supervision and management throughout the sales process;

d) there are concerns of potential waste of the collateral, as 430 and 449 have failed to maintain the property taxes, and documentation has not been provided to establish the utilities are current;

e) the property which comprises Priestner and GP's security requires the oversight of an intendant party to ensure it is being adequately preserved;

f) the balance of convenience weighs in favour of Priestner and GP. 430 and 449 are insolvent, have failed to make any payments towards the indebtedness in the last four months, and are not capable of repaying their arrears, or indebtedness, by way of regular business operations;

g) as noted above, Priestner has the right under the 430 Mortgage, and GP has the right under the 449 Mortgage to appoint a Receiver. While the appointment of a Receiver is extraordinary relief and should be granted cautiously and sparingly, Justice Romaine notes at paragraph 28 of *Paragon* that this factor is less essential to the inquiry where the security documentation provides for the appointment of a Receiver;

Paragon, *supra*, at para 28 **[TAB 4**]

h) while 430 and 449 have indicated they will be cooperative, Priestner and GP have had previous difficulties communicating with and obtaining information from 430 and 449, whereas a Receiver will be able to much more readily obtain the necessary information;

i) as noted above, while the appointment of a receiver is extraordinary relief, this factor is less essential to the inquiry where the security documentation provides for the appointment of a Receiver;

j) it is submitted that a court appointment of a receiver is necessary as it will confer upon the receiver the powers most effectively and efficiently carry out its duties, including dealing with the existing tenants and providing access to the listing realtor(s);

k) the effect that a receivership order will have on the parties is justified when taking into consideration all of the circumstances;

l) the conduct of the parties is supportive of the granting of a Receiver as 430 and 449 have failed to keep the mortgage or the taxes current, and has failed to provide information requested by Priestner and GP;

m) the Receiver may need to be in place for a significant period of time, as it may take a considerable period of time to market and sell the Lands given the value and nature of the properties;

n) while there is cost of appointing a Receiver, it is Priestner and GP's position that the appointment of a Receiver will result in a timely and economical resolution of Priestner and GP's concerns regarding its security and recovery of the indebtedness owed;

o) Priestner and GP submit it is likely the value of 430 and 449's assets will be maximized by appointing a Receiver that can manage and preserve the mortgaged lands and buildings, while facilitating a diligent sales process; and

p) a Court-appointed Receiver will be endowed with significant powers to properly administer the collateral and 430 and 449's respective estates.

28. In the decision of *MTM Commercial Trust v. Statesman and Riverside Quays Ltd*., 2010 ABQB 647 ("***MTM***"), the applicant sought a receivership order pursuant to section 13(2) of the *Judicature Act*. In his reasons, Justice Romaine states:

> As has been noted in *Anderson v. Hunking*, [2010] O.J. No. 3042 (Ont. S.C.J.) at para. 15, the test for the appointment of a receiver is comparable to the test for injunctive relief. Determining whether it is "just and convenient" to grant a receivership requires the court to consider and attempt to balance the rights of both the applicant and the respondent, with the onus on the applicant to establish that such an order is required: *BG International* at para. 17. The factors set out to be considered in a receivership application are focused on the same ultimate question that the court must determine in considering an application for an interlocutory injunction: what are the relative risks to the parties of granting or withholding the remedy?

MTM, at para 11 [**TAB 7**].

29. Such was also the case in *BG International Ltd. v. Canadian Superior Energy*, 2009 ABCA 127 ("***BG International***"), where the applicant did not have authority to appoint a receiver pursuant to security documents. The Alberta Court of Appeal discussed the test to appoint a receiver under the *Judicature Act*, and held:

> In particular, the chambers judge must carefully balance the rights of both the applicant and the respondent. The mere appointment of a receiver can have devastating effects. The respondent referred us to the statement in *Swiss Bank Corp. (Canada) v. Odyssey Industries Inc.* (1995), 30 C.B.R. (3d) 49 (Ont. Gen. Div. [Commercial List]) at para. 31:
>
> > [31] With respect to the hardship to Odyssey and Weston should a receiver be appointed, I am unable to find any evidence of undue or extreme hardship. Obviously the appointment of a receiver always causes hardship to the debtor in that the debtor loses control of its assets and business and may risk having its assets and business sold. The situation in this case is no different.
>
> This quotation does not reflect the law of Alberta. Under the *Judicature Act*, it must be "just and convenient" to grant a receivership order. Justice and convenience can only be established by considering and balancing the position of both parties. The onus is on the applicant. The respondent does not have to prove any special hardship, much less "undue hardship" to resist such an application. The effect of the mere granting of the receivership order must always be considered, and if possible a remedy short of receivership should be used.

BG International, supra at para 17 [**TAB 8**].

30. It is relevant to note that in the *MTM* decision, the application was being brought pursuant to the *Judicature Act* alone, and there was no indication that the applicant held security over the respondent's property.

31. An application to appoint a Receiver was made before the Alberta Court of Queen's Bench in *Kasten Energy Inc. v. Shamrock Oil & Gas Ltd*., 2013 ABQB 63 ("***Kasten***"), wherein the creditor had authority to appoint a Receiver under a general security agreement. This Honourable Court applied a modified and less onerous version of the interlocutory test and held:

> 20 The Alberta Court of Appeal notes in *BG International Ltd. v. Canadian Superior Energy Inc.*, 2009 ABCA 127 (Alta. C.A.) at paras 16-17 that a remedial Order to appoint a Receiver "should not be lightly granted" and the chambers judge should: (i) carefully explore whether there are other remedies, short of a receivership, that could serve to protect the interests of the applicant; (ii) carefully balance the rights of both the applicant and the respondent; and (iii) consider the effect of granting the receivership order, and if possible use a remedy short of receivership.
>
> 21 The security documentation in the present case authorizes the appointment of a Receiver (GSA, para 8.2). Thus, even if I accept the argument that the Applicant Kasten has not been able to demonstrate irreparable harm, that itself would not be determinative of whether or not a Receiver should be appointed in this matter. It is not essential for a creditor to establish irreparable harm if a receiver is not appointed: *Paragon Capital* at para 27.

Kasten Energy Inc. v. Shamrock Oil & Gas Ltd., 2013 ABQB 63 at paras 20 and 21 **[TAB 9**]

32. Similar to the *Paragon* and *Kasten* decisions, 430 and 449 have granted security authorizing the appointment of a receiver, and therefore the modified and less onerous version of the interlocutory test applies.

33. Priestner and GP respectfully submit that there are no other remedies short of the appointment of a Receiver available to Priestner and GP that will adequately protect their respective interests. The balance of the interests of the parties favours Priestner and GP and the appointment of a Receiver of 430 and 449.

B. If this Honourable Court exercises its discretion to appoint a Receiver, what firm ought to be appointed as Receiver?

34. In an application for the appointment of a Receiver, the Court is faced with the task of deciding the appropriate person or firm to be appointed.

35. Notwithstanding that the discretion to select the Receiver is that of this Honourable Court, Priestner and GP respectfully submit that consideration ought to be given to the firm put forward by Priestner and GP, in this case, MNP.

36. The proposition that significant consideration ought to be given to the applicant creditor's proposed appointment is supported by *Confederation Trust Co. v. Dentbram Developments Ltd.,* 9 C.P.C. (3d) 399, Ontario Court of Justice (General Division) Commercial List, wherein Justice Borins held:

> 2 The mortgagor has not provided any evidence why Price Waterhouse, the receiver proposed by the by the plaintiff, should not be appointed. I am satisfied that Price Waterhouse is impartial, disinterested and able to deal with the rights of all interested parties in a fair manner. When receivers proposed by each party possess similar qualities, generally speaking the receiver proposed by the creditor, who has carriage of the proceedings, should be appointed.

Confederation Trust Co. v. Dentbram Developments Ltd., 9 CPC (3d) 399, (Ont Gen Div [Commercial List]) at para 2 **[TAB 10]**

37. MNP is a well-recognized and respected insolvency firm. It is impartial, disinterested and able to deal with the rights of all interested parties in a fair manner.

38. Additionally, MNP has consented to act as Receiver if so appointed by this Honourable Court.

39. Priestner and GP respectfully submit that it would be reasonable for this Honourable Court to exercise its discretion to appoint MNP as the Receiver of 430 and 449.

V. CONCLUSION

40. Mike Priestner Real Estate Inc. and MPRE GP Dev Inc. respectfully submit that, having regard to the circumstances, it is just and convenient to appoint MNP Ltd. as Receiver of the undertakings and property of 2399430 Alberta Ltd. and 2399449 Alberta Ltd.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 7th day of December, 2022.

DENTONS CANADA LLP

Per: _____

NICHOLAS C. WILLIAMS
SOLICITORS FOR MIKE PRIESTNER REAL ESTATE INC. AND MPRE GP DEV INC.

INDEX

TAB

TAB 1

CANADA

CONSOLIDATION

CODIFICATION

Bankruptcy and Insolvency Act

Loi sur la faillite et l'insolvabilité

R.S.C., 1985, c. B-3

L.R.C. (1985), ch. B-3

Current to January 12, 2022

Last amended on November 1, 2019

À jour au 12 janvier 2022

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Audit of proceedings

241 The accounts of every clerk that relate to proceedings under this Part are subject to audit in the same manner as if the accounts were the accounts of a provincial officer.

R.S., c. B-3, s. 212.

Application of this Part

242 (1) The Governor in Council shall, at the request of the lieutenant governor in council of a province, declare, by order, that this Part applies or ceases to apply, as the case may be, in respect of the province.

Automatic application

(2) Subject to an order being made under subsection (1) declaring that this Part ceases to apply in respect of a province, if this Part is in force in the province immediately before that subsection comes into force, this Part applies in respect of the province.

R.S., 1985, c. B-3, s. 242; 2002, c. 7, s. 85; 2007, c. 36, s. 57.

PART XI

Secured Creditors and Receivers

Court may appoint receiver

243 (1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

(a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;

(b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or

(c) take any other action that the court considers advisable.

Restriction on appointment of receiver

(1.1) In the case of an insolvent person in respect of whose property a notice is to be sent under subsection 244(1), the court may not appoint a receiver under subsection (1) before the expiry of 10 days after the day on which the secured creditor sends the notice unless

Vérification des comptes

241 Les comptes de chaque greffier, relatifs aux procédures prévues par la présente partie, sont sujets à vérification de la même manière que s'ils étaient les comptes d'un fonctionnaire provincial.

S.R., ch. B-3, art. 212.

Application

242 (1) À la demande du lieutenant-gouverneur en conseil d'une province, le gouverneur en conseil déclare par décret que la présente partie commence à s'appliquer ou cesse de s'appliquer, selon le cas, dans la province en question.

Application automatique

(2) Sous réserve d'une éventuelle déclaration faite en vertu du paragraphe (1) indiquant qu'elle cesse de s'appliquer à la province en cause, la présente partie s'applique à toute province dans laquelle elle était en vigueur à l'entrée en vigueur de ce paragraphe.

L.R. (1985), ch. B-3, art. 242; 2002, ch. 7, art. 85; 2007, ch. 36, art. 57.

PARTIE XI

Créanciers garantis et séquestres

Nomination d'un séquestre

243 (1) Sous réserve du paragraphe (1.1), sur demande d'un créancier garanti, le tribunal peut, s'il est convaincu que cela est juste ou opportun, nommer un séquestre qu'il habilite :

a) à prendre possession de la totalité ou de la quasi-totalité des biens — notamment des stocks et comptes à recevoir — qu'une personne insolvable ou un failli a acquis ou utilisés dans le cadre de ses affaires;

b) à exercer sur ces biens ainsi que sur les affaires de la personne insolvable ou du failli le degré de prise en charge qu'il estime indiqué;

c) à prendre toute autre mesure qu'il estime indiquée.

Restriction relative à la nomination d'un séquestre

(1.1) Dans le cas d'une personne insolvable dont les biens sont visés par le préavis qui doit être donné par le créancier garanti aux termes du paragraphe 244(1), le tribunal ne peut faire la nomination avant l'expiration d'un délai de dix jours après l'envoi de ce préavis, à moins :

(a) the insolvent person consents to an earlier enforcement under subsection 244(2); or

(b) the court considers it appropriate to appoint a receiver before then.

a) que la personne insolvable ne consente, aux termes du paragraphe 244(2), à l'exécution de la garantie à une date plus rapprochée;

b) qu'il soit indiqué, selon lui, de nommer un séquestre à une date plus rapprochée.

Definition of *receiver*

(2) Subject to subsections (3) and (4), in this Part, ***receiver*** means a person who

(a) is appointed under subsection (1); or

(b) is appointed to take or takes possession or control — of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt — under

(i) an agreement under which property becomes subject to a security (in this Part referred to as a "security agreement"), or

(ii) a court order made under another Act of Parliament, or an Act of a legislature of a province, that provides for or authorizes the appointment of a receiver or receiver-manager.

Définition de *séquestre*

(2) Dans la présente partie, mais sous réserve des paragraphes (3) et (4), ***séquestre*** s'entend de toute personne qui :

a) soit est nommée en vertu du paragraphe (1);

b) soit est nommément habilitée à prendre — ou a pris — en sa possession ou sous sa responsabilité, aux termes d'un contrat créant une garantie sur des biens, appelé « contrat de garantie » dans la présente partie, ou aux termes d'une ordonnance rendue sous le régime de toute autre loi fédérale ou provinciale prévoyant ou autorisant la nomination d'un séquestre ou d'un séquestre-gérant, la totalité ou la quasi-totalité des biens — notamment des stocks et comptes à recevoir — qu'une personne insolvable ou un failli a acquis ou utilisés dans le cadre de ses affaires.

Definition of *receiver* — subsection 248(2)

(3) For the purposes of subsection 248(2), the definition ***receiver*** in subsection (2) is to be read without reference to paragraph (a) or subparagraph (b)(ii).

Définition de *séquestre* — paragraphe 248(2)

(3) Pour l'application du paragraphe 248(2), la définition de ***séquestre***, au paragraphe (2), s'interprète sans égard à l'alinéa a) et aux mots « ou aux termes d'une ordonnance rendue sous le régime de toute autre loi fédérale ou provinciale prévoyant ou autorisant la nomination d'un séquestre ou d'un séquestre-gérant ».

Trustee to be appointed

(4) Only a trustee may be appointed under subsection (1) or under an agreement or order referred to in paragraph (2)(b).

Syndic

(4) Seul un syndic peut être nommé en vertu du paragraphe (1) ou être habilité aux termes d'un contrat ou d'une ordonnance mentionné à l'alinéa (2)b).

Place of filing

(5) The application is to be filed in a court having jurisdiction in the judicial district of the locality of the debtor.

Lieu du dépôt

(5) La demande de nomination est déposée auprès du tribunal compétent dans le district judiciaire de la localité du débiteur.

Orders respecting fees and disbursements

(6) If a receiver is appointed under subsection (1), the court may make any order respecting the payment of fees and disbursements of the receiver that it considers proper, including one that gives the receiver a charge, ranking ahead of any or all of the secured creditors, over all or part of the property of the insolvent person or bankrupt in respect of the receiver's claim for fees or

Ordonnances relatives aux honoraires et débours

(6) Le tribunal peut, relativement au paiement des honoraires et débours du séquestre nommé en vertu du paragraphe (1), rendre toute ordonnance qu'il estime indiquée, y compris une ordonnance portant que la réclamation de celui-ci à l'égard de ses honoraires et débours est garantie par une sûreté de premier rang sur tout ou partie des biens de la personne insolvable ou du

disbursements, but the court may not make the order unless it is satisfied that the secured creditors who would be materially affected by the order were given reasonable notice and an opportunity to make representations.

failli, avec préséance sur les réclamations de tout créancier garanti; le tribunal ne peut toutefois déclarer que la réclamation du séquestre est ainsi garantie que s'il est convaincu que tous les créanciers garantis auxquels l'ordonnance pourrait sérieusement porter atteinte ont été avisés à cet égard suffisamment à l'avance et se sont vu accorder l'occasion de se faire entendre.

Meaning of *disbursements*

(7) In subsection (6), ***disbursements*** does not include payments made in the operation of a business of the insolvent person or bankrupt.

1992, c. 27, s. 89; 2005, c. 47, s. 115; 2007, c. 36, s. 58.

Sens de *débours*

(7) Pour l'application du paragraphe (6), ne sont pas comptés comme débours les paiements effectués dans le cadre des opérations propres aux affaires de la personne insolvable ou du failli.

1992, ch. 27, art. 89; 2005, ch. 47, art. 115; 2007, ch. 36, art. 58.

Advance notice

244 (1) A secured creditor who intends to enforce a security on all or substantially all of

(a) the inventory,

(b) the accounts receivable, or

(c) the other property

of an insolvent person that was acquired for, or is used in relation to, a business carried on by the insolvent person shall send to that insolvent person, in the prescribed form and manner, a notice of that intention.

Préavis

244 (1) Le créancier garanti qui se propose de mettre à exécution une garantie portant sur la totalité ou la quasi-totalité du stock, des comptes recevables ou des autres biens d'une personne insolvable acquis ou utilisés dans le cadre des affaires de cette dernière doit lui en donner préavis en la forme et de la manière prescrites.

Period of notice

(2) Where a notice is required to be sent under subsection (1), the secured creditor shall not enforce the security in respect of which the notice is required until the expiry of ten days after sending that notice, unless the insolvent person consents to an earlier enforcement of the security.

Délai

(2) Dans les cas où un préavis est requis aux termes du paragraphe (1), le créancier garanti ne peut, avant l'expiration d'un délai de dix jours suivant l'envoi du préavis, mettre à exécution la garantie visée par le préavis, à moins que la personne insolvable ne consente à une exécution à une date plus rapprochée.

No advance consent

(2.1) For the purposes of subsection (2), consent to earlier enforcement of a security may not be obtained by a secured creditor prior to the sending of the notice referred to in subsection (1).

Préavis

(2.1) Pour l'application du paragraphe (2), le créancier garanti ne peut obtenir le consentement visé par le paragraphe avant l'envoi du préavis visé au paragraphe (1).

Exception

(3) This section does not apply, or ceases to apply, in respect of a secured creditor

(a) whose right to realize or otherwise deal with his security is protected by subsection 69.1(5) or (6); or

(b) in respect of whom a stay under sections 69 to 69.2 has been lifted pursuant to section 69.4.

Non-application du présent article

(3) Le présent article ne s'applique pas, ou cesse de s'appliquer, au créancier garanti dont le droit de réaliser sa garantie ou d'effectuer toute autre opération, relativement à celle-ci est protégé aux termes du paragraphe 69.1(5) ou (6), ou à l'égard de qui a été levée, aux termes de l'article 69.4, la suspension prévue aux articles 69 à 69.2.

Idem

(4) This section does not apply where there is a receiver in respect of the insolvent person.

1992, c. 27, s. 89; 1994, c. 26, s. 9(E).

Receiver to give notice

245 (1) A receiver shall, as soon as possible and not later than ten days after becoming a receiver, by appointment or otherwise, in respect of property of an insolvent person or a bankrupt, send a notice of that fact, in the prescribed form and manner, to the Superintendent, accompanied by the prescribed fee, and

(a) in the case of a bankrupt, to the trustee; or

(b) in the case of an insolvent person, to the insolvent person and to all creditors of the insolvent person that the receiver, after making reasonable efforts, has ascertained.

Idem

(2) A receiver in respect of property of an insolvent person shall forthwith send notice of his becoming a receiver to any creditor whose name and address he ascertains after sending the notice referred to in subsection (1).

Names and addresses of creditors

(3) An insolvent person shall, forthwith after being notified that there is a receiver in respect of any of his property, provide the receiver with the names and addresses of all creditors.

1992, c. 27, s. 89.

Receiver's statement

246 (1) A receiver shall, forthwith after taking possession or control, whichever occurs first, of property of an insolvent person or a bankrupt, prepare a statement containing the prescribed information relating to the receivership, and shall forthwith provide a copy thereof to the Superintendent and

(a) to the insolvent person or the trustee (in the case of a bankrupt); and

(b) to any creditor of the insolvent person or the bankrupt who requests a copy at any time up to six months after the end of the receivership.

Idem

(4) Le présent article ne s'applique pas dans les cas où une personne agit, à titre de séquestre, à l'égard de la personne insolvable.

1992, ch. 27, art. 89; 1994, ch. 26, art. 9(A).

Avis du séquestre

245 (1) Le séquestre doit, dans les meilleurs délais et au plus tard dans les dix jours suivant la date où il devient, par nomination ou autrement, séquestre à l'égard de tout ou partie des biens d'une personne insolvable ou d'un failli, en donner avis, en la forme et de la manière prescrites, au surintendant — l'avis devant, dans ce cas, être accompagné des droits prescrits — et :

a) s'agissant d'un failli, au syndic;

b) s'agissant d'une personne insolvable, à celle-ci, à tous ceux de ses créanciers dont il a pu, en y allant de ses meilleurs efforts, dresser la liste.

Idem

(2) Le séquestre de tout ou partie des biens d'une personne insolvable est tenu de donner immédiatement avis de son entrée en fonctions à tout créancier dont il prend connaissance des nom et adresse après l'envoi de l'avis visé au paragraphe (1).

Nom et adresse des créanciers

(3) La personne insolvable doit, dès qu'elle est avisée de l'entrée en fonctions d'un séquestre à l'égard de tout ou partie de ses biens, fournir à celui-ci la liste des noms et adresses de tous ses créanciers.

1992, ch. 27, art. 89.

Déclaration

246 (1) Le séquestre doit, dès sa prise de possession ou, si elle survient plus tôt, sa prise de contrôle de tout ou partie des biens d'une personne insolvable ou d'un failli, établir une déclaration contenant les renseignements prescrits au sujet de l'exercice de ses attributions à l'égard de ces biens; il en transmet sans délai une copie au surintendant et :

a) à la personne insolvable ou, en cas de faillite, au syndic;

b) à tout créancier de la personne insolvable ou du failli qui en fait la demande au plus tard six mois après que le séquestre a complété l'exercice de ses attributions en l'espèce.

TAB 2

(e) "registered owner" includes an individual purchasing the land under an agreement for sale;

(f) "residential land" means

(i) a parcel on which a single-family detached unit or duplex unit is located, or

(ii) a residential unit under the *Condominium Property Act*,

that is or was used as a residence.

RSA 2000 cL-7 s47;2002 cA-4.5 s50;2003 c26 s19; 2011 c12 s33

Order of foreclosure

48(1) The effect of an order of foreclosure of a mortgage or encumbrance is to vest the title of the land affected by it in the mortgagee or encumbrancee free from all right and equity of redemption on the part of the owner, mortgagor or encumbrancer or any person claiming through or under the owner, mortgagor or encumbrancer subsequent to the mortgage or encumbrance, and

(a) the order operates as full satisfaction of the debt secured by the mortgage or encumbrance, and

(b) the mortgagee or encumbrancee is deemed a transferee of the land and becomes the owner of it and is entitled to receive a certificate of title for it.

(2) An order nisi may at any time prior to the sale of the mortgaged land under an order for sale or to the granting of a final order for foreclosure, whichever first happens, be relieved against by a postponement of the day fixed for redemption.

(3) When a judge has postponed the day fixed for redemption no appeal lies except on the ground that the discretion of the judge was not exercised judicially.

(4) No order of absolute foreclosure made in an action is deemed to deprive any court of any power that the court had immediately before May 17, 1919, to reopen the foreclosure.

RSA 1980 cL-8 s44;1982 c23 s31

Appointment of receiver

49(1) Notwithstanding section 40, after the commencement of an action on

(a) a mortgage of land other than farm land, or

(b) an agreement for sale of land other than farm land,

to enforce or protect the security or rights under the mortgage or the agreement for sale the Court may do one or both of the following:

(c) appoint, with or without security, a receiver to collect rents or profits arising from the land;

(d) empower the receiver to exercise the powers of a receiver and manager.

(2) If

(a) a mortgage of land or an agreement for sale referred to in subsection (1) is in default, and

(b) rents or profits are arising out of the land that is subject to that mortgage or agreement for sale,

the Court shall, on application by the mortgagee or vendor, appoint a receiver where the Court considers it just and equitable to do so.

(3) Notwithstanding subsections (1) and (2), an application to appoint a receiver may be made ex parte if

(a) in the case of a mortgage, the land is transferred or sold

(i) while the mortgage is in default, or

(ii) within 4 months before the mortgage goes into default,

or

(b) in the case of an agreement for sale, the purchaser's interest in the land is assigned or sold

(i) while the agreement for sale is in default, or

(ii) within 4 months before the agreement for sale goes into default.

(4) The proceeds of rents or profits collected by the receiver, less any fee or disbursements, which may be allowed by the Court to the receiver by way of remuneration, shall be applied

(a) in payment of taxes accruing due or owing on the land in receivership, and

(b) in reduction of the claims of the mortgagee or vendor against the land in receivership.

(5) A receiver appointed pursuant to this section may distrain for rent in arrears in the same manner and with the same right of recovery as a landlord.

(6) On default of the mortgagor or purchaser of the land other than farm land that is in receivership to pay the rents or profits from it, the Court may order possession of the land to be delivered up to the receiver and leased by the receiver, on any terms and conditions that the Court considers fit.

(7) The Court may, on application by the receiver, give the receiver further directions from time to time as the circumstances require.

(8) An order appointing a receiver may be discharged by the Court at any time, but the order shall only be discharged on application after notice.

(9) When and so often as the circumstances require, the Court may, without discharging the order appointing the receiver, substitute another person for the person originally appointed by the order appointing a receiver, and the substituted receiver shall perform all the duties and has all the powers given by the order or this section to the person originally appointed.

(10) When an order appointing a receiver is made under this section, then, unless the Court otherwise directs in that order or in a subsequent order, proceedings in the action on the mortgage or on the agreement for sale shall be stayed until the time that the order appointing a receiver is discharged.

(11) Subsection (10) does not apply when the mortgagor or purchaser is a corporation.

(12) In this section, "farm land" means farm land as defined in section 47(4).

RSA 1980 cL-8 s45;1983 c97 s2;1984 c24 s5

Assignments

50 An assignment in writing for a lease or rent given by a mortgagor or by a purchaser under an agreement for sale in favour of a mortgagee or vendor of it and not being an assignment of the mortgage or agreement for sale itself may be enforced notwithstanding the restrictions contained in section 40.

RSA 1980 cL-8 s46

TAB 3

Province of Alberta

JUDICATURE ACT

Revised Statutes of Alberta 2000
Chapter J-2

Current as of December 11, 2018

Office Consolidation

Alberta Queen's Printer
Suite 700, Park Plaza
10611 - 98 Avenue
Edmonton, AB T5K 2P7
Phone: 780-427-4952
Fax: 780-452-0668

E-mail: qp@gov.ab.ca
Shop on-line at www.qp.alberta.ca

absolutely or on any reasonable terms and conditions that seem just to the Court, all remedies whatsoever to which any of the parties to the proceeding may appear to be entitled in respect of any and every legal or equitable claim properly brought forward by them in the proceeding, so that as far as possible all matters in controversy between the parties can be completely determined and all multiplicity of legal proceedings concerning those matters avoided.

RSA 1980 cJ-1 s8

Province-wide jurisdiction

9 Each judge of the Court has jurisdiction throughout Alberta, and in all causes, matters and proceedings, other than those of the Court of Appeal, has and shall exercise all the powers, authorities and jurisdiction of the Court.

RSA 1980 cJ-1 s9

Part 2
Powers of the Court

Relief against forfeiture

10 Subject to appeal as in other cases, the Court has power to relieve against all penalties and forfeitures and, in granting relief, to impose any terms as to costs, expenses, damages, compensation and all other matters that the Court sees fit.

RSA 1980 cJ-1 s10

Declaration judgment

11 No proceeding is open to objection on the ground that a judgment or order sought is declaratory only, and the Court may make binding declarations of right whether or not any consequential relief is or could be claimed.

RSA 1980 cJ-1 s11

Canadian law

12 When in a proceeding in the Court the law of any province or territory is in question, evidence of that law may be given, but in the absence of or in addition to that evidence the Court may take judicial cognizance of that law in the same manner as of any law of Alberta.

RSA 1980 cJ-1 s12

Part performance

13(1) Part performance of an obligation either before or after a breach thereof shall be held to extinguish the obligation

(a) when expressly accepted by a creditor in satisfaction, or

(b) when rendered pursuant to an agreement for that purpose though without any new consideration.

(2) An order in the nature of a mandamus or injunction may be granted or a receiver appointed by an interlocutory order of the Court in all cases in which it appears to the Court to be just or convenient that the order should be made, and the order may be made either unconditionally or on any terms and conditions the Court thinks just.

RSA 1980 cJ-1 s13

Interest

14(1) In addition to the cases in which interest is payable by law or may be allowed by law, when in the opinion of the Court the payment of a just debt has been improperly withheld and it seems to the Court fair and equitable that the party in default should make compensation by the payment of interest, the Court may allow interest for the time and at the rate the Court thinks proper.

(2) Subsection (1) does not apply in respect of a cause of action that arises after March 31, 1984.

RSA 1980 cJ-1 s15;1984 cJ-0.5 s10

Equity prevails

15 In all matters in which there is any conflict or variance between the rules of equity and common law with reference to the same matter, the rules of equity prevail.

RSA 1980 cJ-1 s16

Equitable relief

16(1) If a plaintiff claims to be entitled

(a) to an equitable estate or right,

(b) to relief on an equitable ground

(i) against a deed, instrument or contract, or

(ii) against a right, title or claim whatsoever asserted by a defendant or respondent in the proceeding,

or

(c) to any relief founded on a legal right,

the Court shall give to the plaintiff the same relief that would be given by the High Court of Justice in England in a proceeding for the same or a like purpose.

(2) If a defendant claims to be entitled

(a) to an equitable estate or right, or

(b) to relief on an equitable ground

TAB 4

2002 ABQB 430
Alberta Court of Queen's Bench

Paragon Capital Corp. v. Merchants & Traders Assurance Co.

2002 CarswellAlta 1531, 2002 ABQB 430, 316 A.R. 128, 46 C.B.R. (4th) 95

PARAGON CAPITAL CORPORATION LTD. (Plaintiff) and MERCHANTS & TRADERS ASSURANCE COMPANY, INSURCOM FINANCIAL CORPORATION, 782640 ALBERTA LTD., 586335 BRITISH COLUMBIA LTD. AND GARRY TIGHE (Defendants)

Romaine J.

Judgment: April 29, 2002
Docket: Calgary 0101-05444

Counsel: Judy D. Burke for Plaintiff
Robert W. Hladun, Q.C. for Defendants

Subject: Corporate and Commercial; Civil Practice and Procedure; Insolvency
Related Abridgment Classifications
Debtors and creditors
VII Receivers
VII.3 Appointment
VII.3.a General principles
Headnote
Receivers --- Appointment — General
Ex parte order was granted in 2001 appointing receiver and manager of property and assets of two of defendant companies, including certain assets pledged by those companies to plaintiff creditor — Defendants brought application to set aside, vary or stay that order — Application dismissed — Evidence at time of ex parte application provided grounds for believing that delay caused by proceeding by notice of motion might entail serious mischief — Evidence existed that assets that had been pledged to plaintiff as security for loan were at risk of disappearance or dissipation — Plaintiff did not fail to make full and candid disclosure of relevant facts in ex parte application — Security agreement provided for appointment of receiver — Conduct of primary representative of defendants contributed to apprehension that certain assets were of less value than was originally represented to plaintiff or that they did not in fact exist — Balance of convenience favoured plaintiff.
Annotation

This decision canvasses the difficult issue of the appropriateness of granting *ex parte* court orders in an insolvency context. Specifically, the facts of this case revolve around the proper exercise of Romaine J.'s jurisdiction pursuant to Rule 387 of the *Alberta Rules of Court*[1] to grant an *ex parte*, without notice, order appointing a receiver over the assets of two debtor companies. This rule provides that an order can be made on an *ex parte* basis in cases where the evidence indicates "serious mischief". Such jurisdiction is also granted to courts in Ontario[2] and in the context of interim receivership orders under the *Bankruptcy and Insolvency Act*.[3] The guiding principles that govern the granting of *ex parte* orders generally were summarized in *B. (M.A.), Re*[4] where it was concluded that the court's discretion to grant such orders should only be exercised in cases where it is found that an emergency exists and where full disclosure has been provided to the court by the applicant. It is generally considered that an emergency is a circumstance where the consequences that the applicant is attempting to avoid are immediate[5] and that such consequences would have irreparable harm.[6]

Insolvency situations are, by their very nature, crisis oriented. Debtors and creditors alike are typically faced with urgent circumstances and must move quickly to preserve value for all stakeholders. The special circumstances encountered in insolvency proceedings have been acknowledged by the Ontario Court of Appeal in *Algoma Steel Inc., Re*[7] where it was recognized that *ex parte* court orders and the lack of adequate notice is often justified in an insolvency context due to the often "urgent, complex and dynamic" nature of the proceedings. However, there is nonetheless a recognition that despite the "real time" nature of insolvency proceedings, the remedy of appointing a receiver is so drastic that doing so without notice to the debtor is to be considered only in extreme cases. In *Royal Bank v. W. Got & Associates Electric Ltd.*,[8] the Alberta Court of Appeal cited the following passage from *Huggins v. Green Top Dairy Farms*[9] with approval:

Appointment of a receiver is a drastic remedy, and while an application for a receiver is addressed in the first instance to the discretion of the court, the appointment ex parte and without notice to take over one's property, or property which is prima facie his, is one of the most drastic actions known to law or equity. It should be exercised with extreme caution and only where emergency or imperative necessity requires it. Except in extreme cases and where the necessity is plainly shown, a court of equity has no power or right to condemn a man unheard, and to dispossess him of property prima facie his and hand the same over to another on an ex parte claim.

The courts in Ontario have also been mindful of this need to be extra vigilant in granting *ex parte* orders in an insolvency context. It is generally recognized that in cases where rights are being displaced or affected, short of urgency, applicants should be given advance notice. In *Royal Oak Mines Inc., Re*,[10] Farley J. stated the following:

I appreciate that everyone is under immense pressure and have concerns in a CCAA application. However, as much advance notice as possible should be given to all interested parties ... At a minimum, absent an emergency, there should be enough time to digest material, consult with one's client and discuss the matter with those allied in interest — and also helpfully with those opposed in interest so as to see if a compromise can be negotiated ... I am not talking of a leisurely process over weeks here; but I am talking of the necessary few days in which the dedicated practitioners in this field have traditionally responded. Frequently those who do not have familiarity with real time litigation have difficulty appreciating that, in order to preserve value for everyone involved, Herculean tasks have to be successfully completed in head spinning short times. All the same everyone is entitled the opportunity to advance their interests. This too is a balancing question.

In light of this balancing of interests, the practice in Ontario has developed to a point that, short of exceptional circumstances, the parties affected by the applicant's proposed order, whether an order pursuant to *Companies' Creditors Arrangement Act*[11] or receivership orders, are typically given some advance notice of the pending application. This is particularly true in cases where there is a known solicitor of record for the interested party. In the present case, it is difficult to say whether sufficient and adequate evidence was proffered to demonstrate that urgent circumstances and a real risk of dissipation of assets existed. As Romaine J. indicated in her reasons, "...it [was] regrettable that the application did not take place in open chambers so that a record would be available."[12] Accordingly, in such circumstances, deference is accorded to the trier of fact. Romaine J. was in the best position to determine whether the test to grant an *ex parte* receivership order was met. Also, it is not clear from Romaine J.'s reasons why given the existence of a solicitor of record for the debtors that prior notice, of any kind, was not given to the debtors in this case. The granting of a receivership order is a serious remedy and those subject to it should, to the extent possible, have a right to due process.

Marc Lavigne*

Table of Authorities

Cases considered by *Romaine J.*:

Bank of Nova Scotia v. Freure Village on Clair Creek, 40 C.B.R. (3d) 274, 1996 CarswellOnt 2328 (Ont. Gen. Div. [Commercial List]) — referred to

Canadian Urban Equities Ltd. v. Direct Action for Life, 73 Alta. L.R. (2d) 367, 68 D.L.R. (4th) 109, 104 A.R. 358, 1990 CarswellAlta 60 (Alta. Q.B.) — referred to

Edmonton Northlands v. Edmonton Oilers Hockey Corp., 147 A.R. 113, 23 C.P.C. (3d) 49, 15 Alta. L.R. (3d) 179, 1993 CarswellAlta 224 (Alta. Q.B.) — referred to

Hover v. Metropolitan Life Insurance Co., (sub nom. *Metropolitan Life Insurance Co. v. Hover)* 237 A.R. 30, (sub nom. *Metropolitan Life Insurance Co. v. Hover)* 197 W.A.C. 30, 1999 CarswellAlta 338, 46 C.P.C. (4th) 213, 91 Alta. L.R. (3d) 226 (Alta. C.A.) — referred to

RJR-MacDonald Inc. v. Canada (Attorney General), 54 C.P.R. (3d) 114, (sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général))* 164 N.R. 1, (sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général))* 60 Q.A.C. 241, 111 D.L.R. (4th) 385, 1994 CarswellQue 120F, [1994] 1 S.C.R. 311, 1994 CarswellQue 120 (S.C.C.) — referred to

Royal Bank v. W. Got & Associates Electric Ltd., 17 Alta. L.R. (3d) 23, 150 A.R. 93, [1994] 5 W.W.R. 337, 1994 CarswellAlta 34 (Alta. Q.B.) — referred to

Royal Bank v. W. Got & Associates Electric Ltd., 1997 CarswellAlta 235, 196 A.R. 241, 141 W.A.C. 241, [1997] 6 W.W.R. 715, 47 C.B.R. (3d) 1 (Alta. C.A.) — referred to

Royal Bank v. W. Got & Associates Electric Ltd. (1997), 224 N.R. 397 (note), 216 A.R. 392 (note), 175 W.A.C. 392 (note) (S.C.C.) — referred to

Schacher v. National Bailiff Services, 1999 CarswellAlta 32 (Alta. Q.B.) — referred to

Swiss Bank Corp. (Canada) v. Odyssey Industries Inc., 30 C.B.R. (3d) 49, 1995 CarswellOnt 39 (Ont. Gen. Div. [Commercial List]) — considered

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

s. 244 — referred to

Rules considered:

Alberta Rules of Court, Alta. Reg. 390/68

Generally — referred to

R. 387 — considered

APPLICATION by defendants to set aside, vary or stay order appointing receiver.

Romaine J.:

INTRODUCTION

1 On March 20, 2001, I granted an *ex parte* order appointing a receiver and manager of the property and assets of Merchants & Traders Assurance Company ("MTAC") and 586335 British Columbia Ltd. ("586335"), including certain assets pledged by MTAC and 586335 to Paragon Capital Corporation Ltd. MTAC, 586335 and the other defendants in this action brought an application to set aside this *ex parte* order. I declined to set aside, vary or stay the *ex parte* order and these are my written reasons for that decision.

SUMMARY

2 The *ex parte* order should not be set aside on any of the grounds submitted by the Defendants, including an alleged failure to establish emergent circumstances, a lack of candour or any kind of non-disclosure or misleading disclosure by Paragon. Hearing the motion to appoint a receiver and manager *de novo*, I am satisfied that the receivership should continue on the terms originally ordered, and that the Defendants have not established that a stay of that receivership should be granted.

FACTS

3 On March 15, 2000, Paragon loaned MTAC $2.4 million. The loan was for a term of six months with an interest rate of 3% per month, and matured on September 15, 2000. MTAC was to make interest-only payments to Paragon in the amount of $72,000.00 per month.

prerogative of a judge to do in Alberta under our rules": *Canadian Urban Equities Ltd. v. Direct Action for Life*, [1990] A.J. No. 253 (Alta. Q.B.) at pages 7 and 8.

21 The *ex parte* order contains the usual provision allowing any party to apply on two clear days notice for a further or other order. The Defendants' right to bring their position before the court on very short notice was therefore reasonably protected. The Notices of Motion seeking orders to set aside or stay the *ex parte* order were not filed until May 8, 2001, and the motions were heard on their merits at the earliest time available to counsel to the parties and the court.

Should the receiver and manager appointed under the ex parte order been precluded from acting in this case due to conflict?

22 This issue is moot, given that on June 8, 2001 an order was granted replacing Hudson & Company as receiver and manager with Richter Allen and Taylor Inc. This was done with the consent of all parties other than the Defendants, who objected to the replacement, while continuing to maintain that Hudson & Company had a conflict. The Defendants make the same complaint about counsel to the former receiver and manager, who did not continue as counsel for the new receiver.

23 Despite the complaint of conflict of interest, the Defendants have not raised any evidence that the former receiver and manager or its counsel preferred Paragon to other creditors, or failed in a receiver's duty as a fiduciary or its duty of care, other than to submit that the receiver should not have been granted the power in the *ex parte* order to sell the assets covered by the order. This power of sale was, of course, subject to court approval, and also subject to review at the time the application was heard on its merits. It was not exercised during the time the *ex parte* order was in place, and representations were heard on its propriety for inclusion in the affirmed receivership order. While there may have been a potential for conflict in Hudson & Company's appointment, there is no evidence that Hudson & Company showed any undue preference to Paragon while serving as a receiver, or failed in its duties as receiver in any way.

24 The Defendants also submit that the Bench Brief used by Paragon's counsel in making the application for the *ex parte* order showed that such counsel was not impartial, but acted as an advocate on this application. Paragon's counsel did indeed advocate that a receiver should be appointed by the court, as he was retained to do, and there was nothing improper in him doing so. I have already said that full disclosure was made of the material facts in that application, including the previous involvement of both the proposed receiver and Paragon's counsel in this matter.

25 I therefore find that there was nothing wrong or improper in the appointment of Hudson & Company as receiver or in Paragon's previous counsel acting as receiver's counsel, or in their administration of the receivership. It may be preferable to avoid an appearance of conflict in these situations, but a finding of conflict or improper preference requires more than just the appearance of it. In situations where it is highly possible that the creditors will not be paid out in full, the use of a party already familiar with the facts to act as receiver may be attractive to all creditors. I note that it is not the creditors who raise the issue of conflict in this case, but the debtors.

Should the ex parte order now be set aside?

26 The general rule is that when an application to set aside an *ex parte* order is made, the reviewing court should hear the motion *de novo* as to both the law and the facts involved. Even if the order should not have been granted *ex parte*, which is not the case here, I may refuse to set it aside if from the material I am of the view that the application would have succeeded on notice: *Edmonton Northlands v. Edmonton Oilers Hockey Corp.* (1993), 15 Alta. L.R. (3d) 179 (Alta. Q.B.) (paragraphs 30 and 31).

27 The factors a court may consider in determining whether it is appropriate to appoint a receiver include the following:

a) whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed, particularly where the appointment of a receiver is authorized by the security documentation;

b) the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets while litigation takes place;

c) the nature of the property;

d) the apprehended or actual waste of the debtor's assets;

e) the preservation and protection of the property pending judicial resolution;

f) the balance of convenience to the parties;

g) the fact that the creditor has the right to appoint a receiver under the documentation provided for the loan;

h) the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulty with the debtor and others;

i) the principle that the appointment of a receiver is extraordinary relief which should be granted cautiously and sparingly;

j) the consideration of whether a court appointment is necessary to enable the receiver to carry out its' duties more efficiently;

k) the effect of the order upon the parties;

l) the conduct of the parties;

m) the length of time that a receiver may be in place;

n) the cost to the parties;

o) the likelihood of maximizing return to the parties;

p) the goal of facilitating the duties of the receiver.

Bennett, Frank, *Bennett on Receiverships*, 2nd edition, (1995), Thompson Canada Ltd., page 130 (cited from various cases)

28 In cases where the security documentation provides for the appointment of a receiver, which is the case here with respect to the General Security Agreement and the Extension Agreement, the extraordinary nature of the remedy sought is less essential to the inquiry: *Bank of Nova Scotia v. Freure Village on Clair Creek*, [1996] O.J. No. 5088 (Ont. Gen. Div. [Commercial List]), paragraph 12.

29 It appears from the evidence before me that the Georgia Pacific shares may be the only asset of real value pledged on this loan. Shares are by their nature vulnerable assets. These shares are in a business that is itself highly sensitive to variations in value. At the time of the application, the business appeared to have been suffering certain financial constraints. The business is situated in British Columbia, and regulated by the Investment Dealers Association of Canada and other entities, giving additional force to the argument of the necessity of a court-appointed receiver. I also note the possibility that there will be a sizeable deficiency in relation to the loan, increasing the risk to Paragon as security holder.

30 The conduct of Mr. Tighe, the primary representative of the Defendants, supports the appointment of a receiver. Although the Defendants submit that the assets that are the subject of the order are secure, there is troubling evidence that the mortgage-backed debentures appear to have questionable value, that the $200,000 that was supposed to be in Mr. Patterson's trust account does not exist, that the Georgia Pacific cash account that was supposed to contain

TAB 5

2010 ABQB 242
Alberta Court of Queen's Bench

Lindsey Estate v. Strategic Metals Corp.

2010 CarswellAlta 641, 2010 ABQB 242, [2010] A.W.L.D. 2495,
[2010] A.W.L.D. 2496, 186 A.C.W.S. (3d) 988, 67 C.B.R. (5th) 88

Ann Nosratieh as Executrix on behalf of the Estate of Robert Laird Lindsey, and Helmut and Eugenie Vollmer, as Representative Plaintiffs (Applicants) and Strategic Metals Corp., Capital Alternatives Inc., The Institute for Financial Learning, Group of Companies Inc., Milowe Allen Brost, Gary Sorenson, Graham Blaikie, Heinz Weiss, True North Productions LLC, Merendon de Honduras S.A. de C.V., Merendon Mining (Nevada) Inc., Merendon Mining (Colorado) Inc., Merendon de Venezuela C.A., Merendon de Peru S.A., Merendon de Ecuador S.A., Arbour Energy Inc., Syndicated Gold Depository S.A., Base Metals Corporation, Evergreen Management Services LLC, 3Sixty Earth Resources Ltd., Ward Capstick, Thayer Jackson, Kristina Katayama, Quatro Communication Corporation, ABC Corp 1 to 9 and John Doe 1 to 9 and Jane Doe 1 to 9 and other entities and individuals known to the Defendants (Respondents)

G.C. Hawco J.

Heard: December 14, 2009
Judgment: April 9, 2010 *
Docket: Calgary 0801-08351

Counsel: Frank R. Dearlove, Michael D. Mysak for Applicants
Kenneth J. Warren, Q.C., Tanya A. Fizzell for Respondents, Gary Sorenson, Merendon Mining Corporation Ltd., Merendon de Honduras S.A. de C.V., Merendon de Venezuela C.A., Merendon de Peru S.A., Merendon de Ecuador S.A.
Victor C. "Dick" Olson, Christopher Archer for Respondent, Arbour Energy Inc.
Richard Glenn for Respondent, Milowe Brost

Subject: Corporate and Commercial; Securities; Insolvency; Civil Practice and Procedure
Related Abridgment Classifications
Debtors and creditors
III Garnishment
III.5 Attachability
III.5.a Prejudgment attachment orders
Debtors and creditors
VII Receivers
VII.3 Appointment
VII.3.b Application for appointment
VII.3.b.iii Grounds
VII.3.b.iii.D Irreparable harm
Headnote
Debtors and creditors --- Receivers — Appointment — Application for appointment — Grounds
Securities commission held hearing against B and others with respect to allegations of misrepresentations and fraud relating to S Corp. — Commission found that S Corp. and it representatives were responsible for false or misleading

statements in offering memoranda and they engaged in course of conduct that amounted to fraud on shareholders of S Corp. — B and associates received $500 million but none was recovered — Commission found that S Corp. was shell of company whose main but undisclosed function was to finance S's mining ventures — Investors alleged that S and his companies and A Inc. were complicit in fraud perpetrated by B — S Corp. was placed into receivership — Investors brought application to have same receiver appointed over assets and undertakings of A Inc. and companies owned by B and S — Application granted — Although S was not involved directly in proceedings before commission, his companies and A Inc. were subject of investigation in view of flow of monies — B's companies, S's companies and A Inc. were involved in receipt and transfer of tens of millions of dollars which flowed freely between B's companies and S's companies — There was no evidence put forward by S to lend any credence to position that he was conducting legitimate business at arm's length with B — There was evidence which suggested contrary — S and his companies received over $50 million directly or indirectly from B and his companies and there was no accounting for any of these monies — B was directing mind of A Inc. and A Inc. shared address and director with S Corp. — There was real risk of irreparable harm in wasting of proposed receivership companies' assets if no order was made — Appointment of receiver would allow assets to be preserved which was essential given nature of claim — Balance of convenience favoured placement of receiver — Receiver would be able to preserve assets and further investigate whereabouts of any other assets — There was no evidence of any harm to companies by placement of receiver.

Debtors and creditors --- Garnishment — Attachability — Prejudgment attachment orders

Securities commission held hearing against B and others with respect to allegations of misrepresentations and fraud relating to S Corp. — Commission found that S Corp. and it representatives were responsible for false or misleading statements in offering memoranda and they engaged in course of conduct that amounted to fraud on shareholders of S Corp. — B and associates received $500 million but none was recovered — Commission found that S Corp. was shell of company whose main but undisclosed function was to finance S's mining ventures — Investors alleged that S and his companies were complicit in fraud perpetrated by B — Investors brought application for attachment order against S — Application granted — In order to obtain attachment order, investors had to show that there was reasonable likelihood of success at trial — S and his companies received between $50 and 80 million in investor funds — There had been no accounting with respect to these funds — S had to do more than simply say he never had contact with investors and that he did not solicit funds from them directly — Looking at conclusions of commission, there was little doubt that S and his companies were key element in raising and dissipation of funds — S appeared to have been key element in fraud perpetrated by B.

Table of Authorities

Cases considered by *G.C. Hawco J.*:

Alberta (Securities Commission) v. Brost (2008), 2008 ABCA 326, 2 Alta. L.R. (5th) 102, 2008 CarswellAlta 1325, 440 A.R. 7, 438 W.A.C. 7 (Alta. C.A.) — considered

APPLICATION by investors for receivership and attachment orders.

G.C. Hawco J.:

Introduction

1 This is another episode in the efforts of the Applicants (and others) to attempt to locate and salvage assets acquired by a number of the Respondents using monies obtained from the Applicants and other investors.

2 On September 25, 2008, I appointed Michael J. Quilling as Receiver of Strategic Metals Corp. ("Strategic"). The Applicants now seek to have the same Receiver appointed over the assets and undertakings of The Institute for Financial Learning, Group of Companies Inc. ("IFFL"), Arbour Energy Inc. ("Arbour"), Merendon Mining Corporation Ltd. ("MMCL") and Syndicated Gold Depository S.A. ("SGD"). In addition, the Applicants seek an order granting the Receiver an Attachment Order or Mereva Injunction against Gary Sorenson ("Sorenson").

3 Mr. Quilling is appointed Receiver over all of the above named companies.

other investors. It gave that to MMCL. I have already referred to the transfer by MMCL to Arbour of an interest in Tar Sands Recovery Limited. This is another example of failure to document or establish in any manner a value. There has been no accounting for funds received.

31 The only assets which Mr. Sorenson claims to have comprises mining properties in Honduras and Equator which, according to Mr. Quilling's report, have no value. He claims that his house in Honduras is in his wife's name. He had been receiving $50,000 per month from MMCL until September 2009. However, he refuses to disclose any bank accounts or any information relating to any assets which he might have anywhere.

32 In determining whether it is just and convenient to appoint a Receiver, a Court should consider various factors such as:

a. whether irreparable harm might be caused if no order is made;

b. the risk to the parties;

c. the risk of waste debtor's assets;

d. the preservation and protection of property pending judicial resolution; and

e. the balance of convenience.

33 There is a real risk of irreparable harm in the wasting of the proposed receivership companies' assets. The proposed receivership companies are experienced at transferring money. The Applicants' evidence is that over $80 million was transferred to corporations controlled by Mr. Brost, Mr. Sorenson and others. None of the companies has accounted for any of the monies received. None of the companies has given this Court assurances that assets will not be transferred. All of the assets of MMCL and the Merendon companies are in Central and South America, outside the ability of this Court to supervise absentee appointment of a Receiver. The purpose of this action is the recovery of funds for investors. Without protection in place, I am satisfied that the ability to manage the affairs of and further investigate the proposed companies, there is a real risk that very little, if any, recovery will be possible.

34 The appointment of a Receiver will allow assets to be preserved. Given the nature of the claim, the preservation of the assets is essential. On Mr. Sorenson's evidence, neither MMCL nor any of the Merendon companies have any operations or assets in North America. Absent Court supervision through a Receiver, they may freely dissipate and shield assets from the investors/creditors.

35 With respect to the balance of convenience, I am of the view that it favours the placement of a Receiver. The Receiver will be able to preserve assets and further investigate the whereabouts of any other assets. His investigative power is essential. Tens of millions of dollars have been raised from investors. The whereabouts of the money is unknown. Large flows of funds between a number of the companies have been identified but the ultimate uses to which those funds have been put have not been identified.

36 I am simply not satisfied that any of the on-going business activities which the companies might be involved will be thwarted by the appointment of a Receiver. I see no evidence of any harm to these companies by the placement of a Receiver. A receivership order will therefore issue, appointing Mr. Quilling as the Receiver.

Attachment Order/Mereva Injunction

37 In order to obtain an Attachment Order, the Applicants must show that there is a reasonable likelihood of success at trial.

2010 ABCA 191
Alberta Court of Appeal

Lindsey Estate v. Strategic Metals Corp.

2010 CarswellAlta 1049, 2010 ABCA 191, [2010] A.W.L.D. 2980, [2010] A.W.L.D. 3006, [2010] A.W.L.D. 3051, [2010] A.W.L.D. 3052, 189 A.C.W.S. (3d) 694, 27 Alta. L.R. (5th) 241, 487 A.R. 262, 495 W.A.C. 262, 69 C.B.R. (5th) 42

Ann Nosratieh as Executrix on behalf of the Estate of Robert Laird Lindsey, and Helmut and Eugenie Vollmer, as Representative Plaintiffs (Respondent / Plaintiffs) and Michael J. Quilling (Respondent / Applicant) and Merendon Mining Corporation Ltd. and Gary Sorenson (Appellant / Defendant) and Strategic Metals Corp., Capital Alternatives Inc., The Institute for Financial Learning, Group of Companies Inc., Milowe Allen Brost, Graham Blaikie, Heinz Weiss, True North Productions LLC, Merendon De Honduras S.A. De C.V., Merendon Mining Inc. Merendon Mining (Nevada) Inc., Merendon Mining (Colorado) Inc., Merendon De Venezuela C.A., Merendon De Peru S.A., Merendon De Equador S.A., Arbour Energy Inc., Syndicated Gold Depository S.A., Base Metals Corporation, Evergreen Management Services LLC, 3Sixty Earth Resources Ltd., Ward Capstick, Thayer Jackson, Kristina Katayama, Quatro Communication Corporation, ABC Corp 1 to 9 and John Doe 1 to 9 and Jane Doe 1 to 9 and other entities and individuals known to the Defendants (Not a Party to the Appeal)

Marina Paperny, Peter Martin JJ.A., Adele Kent J. (ad hoc)

Heard: June 4, 2010
Judgment: June 11, 2010
Docket: Calgary Appeal 1001-0088-AC

Proceedings: affirmed *Lindsey Estate v. Strategic Metals Corp.* ((2010)), 2010 CarswellAlta 641, 2010 ABQB 242 ((Alta. Q.B.))

Counsel: K.J. Warren, Q.C., T.A. Frizzell for Appellants
F.R. Dearlove, M.D. Mysak for Respondents

Subject: Corporate and Commercial; Securities; Evidence; Insolvency; Civil Practice and Procedure
Related Abridgment Classifications
Bankruptcy and insolvency
IV Receivers
IV.1 Appointment
Evidence
V Documentary evidence
V.2 Public documents
V.2.a Court documents
Remedies
II Injunctions
II.2 Prohibitive injunctions
II.2.e Miscellaneous
Securities

VI Offences
VI.6 Fraud

Headnote

Securities --- Offences — Fraud

Investors brought action against defendant corporations and principals, M, S, and S Inc. et al., claiming that defendants were operating "ponzi scheme" that fraudulently deprived them of tens of millions of dollars — Alberta Securities Commission ("ASC") was in process of investigating defendants for violations of securities legislation related to alleged ponzi scheme — ASC had already held hearings with regard to some defendants, although neither defendant M or S was party to hearing they figured prominently in reasons of ASC — ASC found that S Inc. was merely funnel for money to flow to M and thereafter S personally — After ASC decision, investors sought receivership order for S Inc., Texas lawyer was appointed receiver of S Inc. — Lawyer subsequently applied and was granted attachment order against S, and to have himself appointed receiver of M — Defendants appealed — Appeal dismissed — Requirement of lis has been defined as piece of litigation or controversy or dispute, it was apparent that S Inc. would have to pursue M in order to recover assets claimed by investors, as receiver, lawyer was entitled to bring receivership application against M in order to preserve those assets — Lawyer also had standing to apply for attachment order against S Inc., applicant for attachment order must be person asserting claim, claim defined as claim that may result in money judgment, given nature of lis and role receiver was expected to play, requirement was met — Reasons of ASC and court were not admissible as evidence against defendants as they were not parties to previous proceedings, however, chambers judge relied extensively on affidavit which did not rely on ASC reasons for its substantive content.

Evidence --- Documentary evidence — Public documents — Court documents — Judgments

Investors brought action against defendant corporations and principals, M, S, and S Inc. et al., claiming that defendants were operating "ponzi scheme" that fraudulently deprived them of tens of millions of dollars — Alberta Securities Commission ("ASC") was in process of investigating defendants for violations of securities legislation related to alleged ponzi scheme — ASC had already held hearings with regard to some defendants, although neither defendant M or S was party to hearing they figured prominently in reasons of ASC — ASC found that S Inc. was merely funnel for money to flow to M and thereafter S personally — After ASC decision, investors sought receivership order for S Inc., Texas lawyer was appointed receiver of S Inc. — Lawyer subsequently applied and was granted attachment order against S, and to have himself appointed receiver of M — Defendants appealed — Appeal dismissed — Requirement of lis has been defined as piece of litigation or controversy or dispute, it was apparent that S Inc. would have to pursue M in order to recover assets claimed by investors, as receiver, lawyer was entitled to bring receivership application against M in order to preserve those assets — Lawyer also had standing to apply for attachment order against S Inc., applicant for attachment order must be person asserting claim, claim defined as claim that may result in money judgment, given nature of lis and role receiver was expected to play, requirement was met — Reasons of ASC and court were not admissible as evidence against defendants as they were not parties to previous proceedings, however, chambers judge relied extensively on affidavit which did not rely on ASC reasons for its substantive content.

Bankruptcy and insolvency --- Receivers — Appointment

Investors brought action against defendant corporations and principals, M, S, and S Inc. et al., claiming that defendants were operating "ponzi scheme" that fraudulently deprived them of tens of millions of dollars — Alberta Securities Commission ("ASC") was in process of investigating defendants for violations of securities legislation related to alleged ponzi scheme — ASC had already held hearings with regard to some defendants, although neither defendant M or S was party to hearing they figured prominently in reasons of ASC — ASC found that S Inc. was merely funnel for money to flow to M and thereafter S personally — After ASC decision, investors sought receivership order for S Inc., Texas lawyer was appointed receiver of S Inc. — Lawyer subsequently applied and was granted attachment order against S, and to have himself appointed receiver of M — Defendants appealed — Appeal dismissed — Requirement of lis has been defined as piece of litigation or controversy or dispute, it was apparent that S Inc. would have to pursue M in order to recover assets claimed by investors, as receiver, lawyer was entitled to bring receivership application against M in order to preserve those assets — Lawyer also had standing to apply for attachment order against S Inc., applicant for attachment order must be person asserting claim, claim defined as claim that may result in money judgment, given nature of lis and role receiver was expected to play, requirement was met — Reasons of ASC and court were not admissible as evidence against defendants as they were not parties to previous proceedings, however, chambers judge relied extensively on affidavit which did not rely on ASC reasons for its substantive content.

Remedies --- Injunctions — Rules governing injunctions — Interlocutory, interim and permanent injunctions — Miscellaneous

Receivership — Investors brought action against defendant corporations and principals, M, S, and S Inc. et al., claiming that defendants were operating "ponzi scheme" that fraudulently deprived them of tens of millions of dollars — Alberta Securities Commission ("ASC") was in process of investigating defendants for violations of securities legislation related to alleged ponzi scheme — ASC had already held hearings with regard to some defendants, although neither defendant M or S was party to hearing they figured prominently in reasons of ASC — ASC found that S Inc. was merely funnel for money to flow to M and thereafter S personally — After ASC decision, investors sought receivership order for S Inc., Texas lawyer was appointed receiver of S Inc. — Lawyer subsequently applied and was granted attachment order against S, and to have himself appointed receiver of M — Defendants appealed — Appeal dismissed — Requirement of lis has been defined as piece of litigation or controversy or dispute, it was apparent that S Inc. would have to pursue M in order to recover assets claimed by investors, as receiver, lawyer was entitled to bring receivership application against M in order to preserve those assets — Lawyer also had standing to apply for attachment order against S Inc., applicant for attachment order must be person asserting claim, claim defined as claim that may result in money judgment, given nature of lis and role receiver was expected to play, requirement was met — Reasons of ASC and court were not admissible as evidence against defendants as they were not parties to previous proceedings, however, chambers judge relied extensively on affidavit which did not rely on ASC reasons for its substantive content.

Table of Authorities

Cases considered:

Alberta (Securities Commission) v. Brost (2008), 2008 ABCA 326, 2 Alta. L.R. (5th) 102, 2008 CarswellAlta 1325, 440 A.R. 7, 438 W.A.C. 7 (Alta. C.A.) — referred to

Canada Mortgage & Housing Corp. v. York Condominium Corp. No. 46 (1981), 119 D.L.R. (3d) 423, 31 O.R. (2d) 514, 1981 CarswellOnt 1208 (Ont. Co. Ct.) — referred to

Capital Alternatives Inc., Re (2007), 2007 CarswellAlta 2361, 2007 ABASC 482 (Alta. Securities Comm.) — referred to

Edwards v. Law Society of Upper Canada (1995), 1995 CarswellOnt 998, 40 C.P.C. (3d) 316 (Ont. Gen. Div.) — referred to

Lindsey Estate v. Strategic Metals Corp. (2008), 2008 CarswellAlta 1338, 2008 ABQB 602 (Alta. Q.B.) — referred to

Moyes v. Fortune Financial Corp. (2002), 22 C.P.C. (5th) 154, 2002 CarswellOnt 1532 (Ont. S.C.J.) — referred to

Statutes considered:

Civil Enforcement Act, R.S.A. 2000, c. C-15

s. 16 "claim" — considered

s. 16 "claimant" — considered

s. 17 — referred to

Judicature Act, R.S.A. 2000, c. J-2

s. 13(2) — referred to

APPEAL from decision granting pre-judgment relief to receiver in form of attachment order and receivership order against defendants.

***Per Curiam*:**

Background

1 This appeal is from an order granting pre-judgment relief to Michael Quilling, Receiver of Strategic Metals Inc. (Strategic) in the form of an attachment order against the appellant Sorenson and a receivership order for the appellant Merendon Mining Corporation Ltd (Merendon), both of whom are defendants in the underlying proceedings.

2 Those proceedings were begun by two statements of claim, the first in Action No. 0801-08351 (*Lindsey Estate v. Strategic Metals Corp.*) filed July 14, 2008, and the second in Action No. 0801-14107 (*Vollmer v Merendon*, Sorenson) filed November 12, 2008. The plaintiffs in both actions were investors in the defendant corporations. The personal defendants were or are principals of those corporations. The plaintiffs claim that the defendants were operating a "ponzi scheme" that fraudulently deprived them of tens of millions of dollars. The two actions were consolidated by order dated November 17, 2009.

TAB 6

2019 ABQB 545
Alberta Court of Queen's Bench

Schendel Management Ltd., Re

2019 CarswellAlta 1457, 2019 ABQB 545, [2019] A.W.L.D. 3043, [2019] A.W.L.D. 3044, 308 A.C.W.S. (3d) 472, 73 C.B.R. (6th) 13

In the Matter of the Notice of Intention to Make a Proposal of Schendel Mechanical Contracting Ltd

the Notice of Intention To Make a Proposal of Schendel Management Ltd.

the Notice of Intention To Make a Proposal of 687772 Alberta Ltd.

M.J. Lema J.

Heard: July 16, 2019
Judgment: July 19, 2019
Docket: Edmonton BK03-115990, BK03-115991

Counsel: Jim Schmidt, Katherine J. Fisher, for Debtor Companies
Dana M. Nowak, for Proposal Trustee
Pantelis Kyriakakis, Walker MacLeod, for Applicant, ATB

Subject: Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
IV Receivers
IV.1 Appointment
Bankruptcy and insolvency
VI Proposal
VI.1 General principles
Headnote
Bankruptcy and insolvency --- Proposal — General principles
Three related companies, major construction conglomerate, hit rough patch when work on one of their major projects was halted — Work stoppage affected companies' profitability, and eventually caused it to default on amounts owing to Alberta Treasury Branches (ATB), its principal lender, and ATB issued demand letters to companies and notices of intention to enforce security — Companies filed notice of intention to file proposal under s. 50.4(1) of Bankruptcy and Insolvency Act (BIA), triggering stay of enforcement of action by ATB and other creditors — Companies filed proposal — ATB applied for orders deeming joint proposal refused, lifting proposal stay of proceedings, and appointing receiver and manager — Application granted — Pursuant to s. 50(12) of BIA, proposal would not likely be accepted by creditors, and was deemed refused — ATB had true veto, it intended to vote no, and proposal would necessarily fail — ATB would vote no because it regarded proposal as unsatisfactory — Focus was on existing proposal — None of identified ATB steps showed absence of good faith or showed commercial unreasonableness — ATB was not attempting to pursue improper purpose, and was pursuing its interests and asserting its rights within bounds of and for purposes squarely within Canadian insolvency system — Given its secured position, BIA provisions governing secured creditors and approval of proposals, and proposal itself, and ATB was entitled to oppose proposal and seek deemed refused ruling — ATB believed, on reasonable or defensible or arguable grounds, that it would fare better by receivership than under proposal — ATB was not acting perversely or vindictively or otherwise than in its own economic interests, and it was

not pursuing any ulterior purposes — ATB established that proposal was unlikely to be approved and that, in circumstances, proposal should be deemed refused.

Bankruptcy and insolvency --- Receivers — Appointment

Three related companies, major construction conglomerate, hit rough patch when work on one of their major projects was halted — Work stoppage affected companies' profitability, and eventually caused it to default on amounts owing to Alberta Treasury Branches (ATB), its principal lender, and ATB issued demand letters to companies and notices of intention to enforce security — Companies filed notice of intention to file proposal under s. 50.4(1) of Bankruptcy and Insolvency Act (BIA), triggering stay of enforcement of action by ATB and other creditors — Companies filed proposal — ATB applied for orders deeming joint proposal refused, lifting proposal stay of proceedings, and appointing receiver and manager — Application granted — Appointing receiver and manager was warranted — Companies were large enterprise with complex construction projects underway — Coordinating and managing pursuit of receivables required expertise and resources of experienced receiver-manager, and recovery that way was likely to be more efficient and effective — ATB's security documents contemplated court appointing receiver-manager on companies' default, companies had defaulted, and ATB was almost certain to experience shortfall — ATB's affidavit evidence clearly outlined extent of companies' default, state of its various projects, and complex nature of work required to complete, collect or otherwise harvest its receivables — ATB's conduct did not reflect commercial unreasonableness or absence of good faith.

Table of Authorities

Cases considered by *M.J. Lema J.*:

Enirgi Group Corp. v. Andover Mining Corp. (2013), 2013 BCSC 1833, 2013 CarswellBC 3026, 6 C.B.R. (6th) 32 (B.C. S.C.) — distinguished

Hypnotic Clubs Inc., Re (2010), 2010 ONSC 2987, 2010 CarswellOnt 3463, 68 C.B.R. (5th) 267 (Ont. S.C.J. [Commercial List]) — considered

Laserworks Computer Services Inc., Re (1998), 1998 CarswellNS 38, (sub nom. *Laserworks Computer Services Inc. (Bankrupt), Re)* 165 N.S.R. (2d) 297, (sub nom. *Laserworks Computer Services Inc. (Bankrupt), Re)* 495 A.P.R. 297, 6 C.B.R. (4th) 69, 37 B.L.R. (2d) 226, 1998 NSCA 42, 165 N.S.R. (2d) 296 (N.S. C.A.) — considered

Marine Drive Properties Ltd., Re (2009), 2009 BCSC 145, 2009 CarswellBC 285, 52 C.B.R. (5th) 47 (B.C. S.C.) — considered

Murphy v. Cahill (2013), 2013 ABQB 335, 2013 CarswellAlta 1490, 88 Alta. L.R. (5th) 69, 568 A.R. 80 (Alta. Q.B.) — considered

Paragon Capital Corp. v. Merchants & Traders Assurance Co. (2002), 2002 ABQB 430, 2002 CarswellAlta 1531, 316 A.R. 128, 46 C.B.R. (4th) 95 (Alta. Q.B.) — followed

Promax Energy Inc. v. Lorne H. Reed & Associates Ltd. (2002), 2002 ABCA 239, 2002 CarswellAlta 1241 (Alta. C.A.) — considered

Sport Maska Inc. v. RBI Plastique Inc./RBI Plastic Inc. (2005), 2005 NBQB 394, 2005 CarswellNB 635, (sub nom. *RBI Plastic Inc. (Bankrupt), Re)* 290 N.B.R. (2d) 278, (sub nom. *RBI Plastic Inc. (Bankrupt), Re)* 755 A.P.R. 278, 17 C.B.R. (5th) 244 (N.B. Q.B.) — considered

The Bank of Nova Scotia v. 1934047 Ontario Inc. (2018), 2018 ONSC 4669, 2018 CarswellOnt 12568 (Ont. S.C.J.) — considered

Toronto-Dominion Bank v. Rismani (2015), 2015 BCSC 596, 2015 CarswellBC 991, 25 C.B.R. (6th) 127 (B.C. S.C.) — considered

West Coast Logistics Ltd. (Re) (2017), 2017 BCSC 1970, 2017 CarswellBC 3014, 53 C.B.R. (6th) 68 (B.C. S.C.) — considered

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

s. 50(4) — referred to

s. 50(12) — considered

s. 50.4(1) [en. 1992, c. 27, s. 19] — considered

s. 62(2)(b) — considered

s. 69.1 [en. 1992, c. 27, s. 36(1)] — considered

s. 69.4 [en. 1992, c. 27, s. 36(1)] — considered

s. 243 — considered

s. 244 — considered

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — referred to

Judicature Act, R.S.A. 2000, c. J-2

s. 13(2) — considered

Personal Property Security Act, R.S.A. 2000, c. P-7

s. 66 — considered

APPLICATION by secured creditor for orders deeming refused joint proposal made by three related corporations, lifting proposal stay of proceedings, and appointing receiver and manager.

M.J. Lema J.:

A. Introduction

1 A secured creditor applies under ss. 50(12) and s. 69.4 of the *Bankruptcy and Insolvency Act* (*BIA*) for orders deeming refused a joint proposal made by three related corporations, lifting the proposal stay of proceedings, and appointing a receiver and manager. The corporations oppose all aspects. The proposal trustee provided stage-setting submissions but did not take a position.

2 I find, under ss. 50(12) *BIA*, that the application is not likely to be accepted by the creditors (and is thus deemed refused), that the corporations are bankrupt as a result, and that Pricewaterhousecoopers (PwC) should be appointed as receiver and manager of them. My reasoning follows.

B. Facts

3 The key facts for the purpose of this application are that:

- Schendel Mechanical Contracting Ltd, Schendel Management Ltd and 687772 Alberta Ltd (collectively Schendel) is a major construction conglomerate in Alberta;

- after decades of business success, Schendel hit a rough patch in fall 2018, when work on one of its major projects (the Grande Prairie Regional Hospital) was halted by Alberta;

- the work stoppage affected Schendel's profitability, eventually causing it to default on amounts owing to Alberta Treasury Branches, its principal lender since 2016. That prompted ATB to conduct an up-close review of Schendel's financial affairs, culminating in a meeting between Schendel and ATB officials on March 13, 2019;

- Schendel's takeaway from the meeting was that, while ATB had some concerns, they were not pressing, and that Schendel would have between three and six months to formulate a plan to address its financial strains;

- however, later that day, ATB issued to Schendel demand letters and notices of intention to enforce security effective March 23, 2019;

E. Appointment of receiver

43 ATB also applied to have PwC appointed as receiver and manager of Schendel. It invokes s. 243 *BIA* and s. 13(2) of the *Judicature Act*. Schendel opposes.

Test for appointing a receiver

44 In *Paragon Capital Corp. v. Merchants & Traders Assurance Co.* [13], Romaine J held:

> The factors a court may consider in determining whether it is appropriate to appoint a receiver include the following:
>
> a) whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed, particularly where the appointment of a receiver is authorized by the security documentation;
>
> b) the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets while litigation takes place;
>
> c) the nature of the property;
>
> d) the apprehended or actual waste of the debtor's assets;
>
> e) the preservation and protection of the property pending judicial resolution;
>
> f) the balance of convenience to the parties;
>
> g) the fact that the creditor has the right to appoint a receiver under the documentation provided for the loan;
>
> h) the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulty with the debtor and others;
>
> i) the principle that the appointment of a receiver is extraordinary relief which should be granted cautiously and sparingly;
>
> j) the consideration of whether a court appointment is necessary to enable the receiver to carry out its' duties more efficiently;
>
> k) the effect of the order upon the parties;
>
> l) the conduct of the parties;
>
> m) the length of time that a receiver may be in place;
>
> n) the cost to the parties;
>
> o) the likelihood of maximizing return to the parties;
>
> p) the goal of facilitating the duties of the receiver.
>
> Bennett, Frank, *Bennett on Receiverships*, 2nd edition, (1995), Thompson Canada Ltd., page 130 (cited from various cases).

In cases where the security documentation provides for the appointment of a receiver, which is the case here with respect to the General Security Agreement and the Extension Agreement, the extraordinary nature of the remedy sought is less essential to the inquiry [authority omitted].

45 In *Murphy v. Cahill* [14], Veit J updated that factor list, noting that:

> . . . the current [2011] edition of Bennett emphasizes, in relation to the second factor, the risk to the security holder, that "*the court may not consider this factor to be important if there is no danger or jeopardy to the security holder or in other words, there is a substantial equity that will protect the security holder*". ... One factor which is not mentioned in the *Paragon* list is "the rights of the parties [to the property]". Similarly, in relation to the factor of the effect of the order on the parties, the current edition of Bennett adds "If a receiver is appointed, its effect may be devastating upon the parties and their business and, where the business has to be sold, the appointment of a receiver may have a detrimental effect upon the price". Along the same lines, in relation to the length of the order, the current edition of Bennett adds " . . . where a claimant moves for an order appointing a receiver for a short period, say six weeks, the court is reluctant to make such an appointment as it has devastating effects on the parties". Finally, the current edition of Bennett adds the following factor: "(18) the secured creditor's good faith, commercial reasonableness of the proposed appointment and any questions of equity." [emphasis added]

Arguments

46 ATB argues that appointing a receiver-manager is warranted because:

- "the debtors are unable to continue as viable entities or continue operations as
  - the Proposal is not viable;
  - the Debtors operate at a loss;
  - the Proposal will not be approved by [ATB]; and
  - the Proposal cannot, even by its own terms, be implemented;
- [ATB] is the Debtors' senior secured and fulcrum creditor;
- [ATB] has lost all confidence in management of the Debtors and does not support the Proposal;
- [ATB] has valid and serious concerns regarding the preservation and protection of the Property, especially following the determination and undeniable conclusion that the Debtors' NOI Proceedings and the Proposal are doomed to fail";
- a receiver-manager is needed to take charge of Schendel's affairs and to coordinate and manage the pursuit of Schendel's construction (and any other) receivables arising out of multiple projects and involving multiple competing parties;
- a receiver-manager will be better able to preserve, and maximize the recovery out of, Schendel's assets overall, compared to ATB enforcing via actions on its individual security elements (general security agreement, mortgage, and so on); and
- ATB's security documents contemplate the appointment of a court-appointed receiver on default;

47 Schendel opposes, arguing that:

- a receiver should be appointed only where it is "just and equitable in the circumstances";
- "jurisdiction to appoint a receiver ought to be exercised sparingly";

TAB 7

2010 ABQB 647
Alberta Court of Queen's Bench

MTM Commercial Trust v. Statesman Riverside Quays Ltd.

2010 CarswellAlta 2041, 2010 ABQB 647, [2010] A.J. No. 1189, [2011] A.W.L.D. 35, [2011] A.W.L.D. 37, [2011] A.W.L.D. 5, [2011] A.W.L.D. 66, [2011] A.W.L.D. 8, 193 A.C.W.S. (3d) 1284, 70 C.B.R. (5th) 233, 98 C.L.R. (3d) 198

MTM Commercial Trust and Matco Investments Ltd. (Applicants) and Statesman Riverside Quays Ltd., Riverside Quays Limited Partnership and Statesman Master Builders Inc. (Respondents)

B.E. Romaine J.

Judgment: October 12, 2010
Docket: Calgary 1001-09828

Counsel: Blair C. Yorke-Slader, Q.C., Kelsey J. Drozdowski for Applicants
Robert W. Calvert, Q.C., Larry B. Robinson, Q.C., Sharilyn C. Nagina for Respondents

Subject: Corporate and Commercial; Insolvency

Headnote

Alternative dispute resolution --- Relation of arbitration to court proceedings — Stay of court proceedings — General principles
Debtors and creditors --- Receivers — Appointment — General principles
M Trust and M Ltd. (collectively applicants) and S Ltd. and S Inc. (collectively respondents) entered into series of agreements regarding residential development project — Partnership was created — Applicants alleged respondents breached various agreements, were guilty of misconduct that amounted to fraud and dishonesty, and commenced phase 2 of construction on project without proper approvals — Applicants applied for, inter alia, appointment of receiver manager of Partnership and S Ltd. — Respondents cross-applied for various declarations — Respondents voluntarily halted construction on project and undertook not to recommence construction without court order — Application granted in part on other grounds; cross-application dismissed — Applicants' concession that receiver was not necessary as long as construction on project did not recommence was consistent with principle that court considering appointment of receiver must carefully explore remedies short of receivership that could protect interests of applicant — Applicants acknowledged that cessation of construction due to voluntary undertaking served same purpose and was adequate remedy — Question became less whether receiver should be appointed and more whether voluntary undertaking to cease construction should be replaced by court-imposed injunction restraining respondents from further construction on project pending resolution of matters between parties.
Contracts --- Remedies for breach — Injunction
M Trust and M Ltd. (collectively applicants) and S Ltd. and S Inc. (collectively respondents) entered into series of agreements regarding residential development project — Partnership was created — Applicants alleged respondents breached various agreements, were guilty of misconduct that amounted to fraud and dishonesty, and commenced phase 2 of construction on project without proper approvals — M brought application for appointment of receiver manager of partnership and other relief; respondents cross-applied for various declarations — Application granted in part; cross-applications dismissed on other grounds — Respondents enjoined from continuing construction on project until issues of alleged breach of contract and other misconduct could be resolved on merits or until parties agreed otherwise — Applicants established strong prima facie case of breach of contract on question whether respondents proceeded with construction of phase 2 of project without necessary approvals of applicants as required under various agreements — Breaches amounted to breach of negative obligation, which was in substance obligation not to proceed to next phase of construction without obtaining Management Committee approval or approval of all S Ltd. directors under Unanimous Shareholders Agreement — If project were to fall into financial distress as result of untimely or imprudent commitments to proceed, it would be very difficult to quantify loss suffered — Applicants established that, on

balance, failure to enjoin further contractual breaches would give rise to irreparable harm — Balance of convenience favoured applicants, as failure to grant injunction would nullify its contractual right to be part of decision to proceed — If remedy was withheld, that right would be so impaired by time issues could be ultimately determined on their merits by unilateral action by respondents that it would be too late to afford applicants complete relief.

Contracts --- Construction and interpretation — Miscellaneous

M Trust and M Ltd. (collectively applicants) and S Ltd. and S Inc. (collectively respondents) entered into series of agreements regarding residential development project — Partnership was created — Under Development Management Agreement (DMA), S Inc. was appointed as Manager of intended development — DMA provided that it shall terminate if Manager "misappropriates any monies or defrauds Partnership in any manner whatsoever" — Applicants alleged respondents breached various agreements — Applicants alleged that S Inc. misappropriated partnership funds and commenced phase 2 of construction on project without proper approvals — Applicants brought application for, inter alia, order confirming termination of S Inc. as Manager of Project; respondents brought cross-application for, inter alia, declaration that S Inc. remained Manager — Application granted in part on other grounds; cross-application dismissed — While applicants established strong prima facie case of contractual breach, issue of whether alleged breach was misappropriation was not entirely without doubt — It would also not be clear until issue of whether S Ltd. remained General Partner of Partnership who had authority to act for Partnership in order to instigate termination of DMA — Issue of removal and replacement of General Partner remained to be determined on its merits — No final determination made with respect to this issue.

Business associations --- Creation and organization of business associations — Partnerships — Relationship between partners — Membership — Introduction and expulsion

M Trust and M Ltd. (collectively applicants) and S Ltd. and its affiliate S Inc. (collectively respondents) entered into series of agreements regarding residential development project — Partnership was created — By terms of Limited Partnership Agreement, S Ltd. was appointed General Partner — Applicants alleged that S Ltd.'s actions in starting over $2 million of phase 2 construction and committing partnership to over $12.5 million of phase 2 construction contracts without approval of directors of S Ltd. as required by agreement and without meeting bank's requirements for funding of phase 2 credit facility, S Ltd.'s involvement in alleged "dummy trades" scheme and use of S Ltd. as co-signatory on promissory note unrelated to project all justified removal of S Ltd. as General Partner of partnership — Applicants brought application for, inter alia, order confirming removal of S Ltd. as General Partner; respondents cross-applied for various declarations, including declaration confirming S Ltd. as General Partner — Application granted in part on other grounds; cross-application dismissed — Interlocutory injunction granted in present application achieved purpose of enjoining further alleged breaches while preserving respondents' rights to fully present evidence and argument on issues of contractual authority — While applicants established strong prima facie case, there were ambiguities in agreements and submissions made with respect to contractual interpretation that did not make matter entirely without doubt — At present stage of proceedings, removal of S Ltd. as General Partner not confirmed — Confirmation of appointment and confirmation of new General Partner was premature — S Ltd. not confirmed as General Partner.

Table of Authorities

Cases considered by *B.E. Romaine J.*:

Anderson v. Hunking (2010), 2010 CarswellOnt 5191, 2010 ONSC 4008 (Ont. S.C.J.) — considered

BG International Ltd. v. Canadian Superior Energy Inc. (2009), 2009 CarswellAlta 469, 2009 ABCA 127, 53 C.B.R. (5th) 161, 71 C.P.C. (6th) 156, 457 A.R. 38, 457 W.A.C. 38 (Alta. C.A.) — referred to

Hammer Pizza Ltd. v. Domino's Pizza of Canada Ltd. (1997), 1997 CarswellAlta 1233 (Alta. Q.B.) — referred to

Janco (Huppe) v. Vereecken (1982), 40 B.C.L.R. 106, 1982 CarswellBC 500, 44 C.B.R. (N.S.) 211 (B.C. C.A.) — referred to

Kitnikone, Re (1999), 2 C.P.R. (4th) 86, 13 C.B.R. (4th) 76, 1999 CarswellBC 2114 (B.C. S.C.) — referred to

New Era Nutrition Inc. v. Balance Bar Co. (2004), 2004 ABCA 280, 2004 CarswellAlta 1200, 47 B.L.R. (3d) 296, 357 A.R. 184, 334 W.A.C. 184, 245 D.L.R. (4th) 107, 33 Alta. L.R. (4th) 1 (Alta. C.A.) — referred to

RJR-MacDonald Inc. v. Canada (Attorney General) (1994), [1994] 1 S.C.R. 311, 1994 CarswellQue 120F, 1994 CarswellQue 120, 54 C.P.R. (3d) 114, (sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général))* 164 N.R. 1, (sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général))* 60 Q.A.C. 241, 111 D.L.R. (4th) 385 (S.C.C.) — followed

Statutes considered:

Business Corporations Act, R.S.A. 2000, c. B-9

Generally — referred to

Judicature Act, R.S.A. 2000, c. J-2

s. 13(2) — referred to

Rules considered:

Alberta Rules of Court, Alta. Reg. 390/68

Generally — referred to

APPLICATION for appointment of receiver manager of Partnership and General Partner and other relief; CROSS-APPLICATION by respondents for various declarations.

***B.E. Romaine J.*:**

Introduction

1 By Originating Notice filed July 8, 2010, the Applicants MTM Commercial Trust and Matco Investments Ltd. (collectively, "Matco") applied for:

> (a) the appointment of a receiver and manager of Riverside Quays Limited Partnership (the "Partnership") and of its initial General Partner Statesman Riverside Quays Ltd. ("SRQL");
>
> (b) an order confirming the termination of Statesman Master Builders Inc. ("SMBI") as Manager of the Riverside Quays multi-family residential construction project (the "Project") pursuant to the terms of the Development Management Agreement (the "DMA");
>
> (c) an order confirming the removal of SRQL as the General Partner of the Partnership, and of its replacement by 1358846 Alberta Ltd. ("1358846"), an affiliate of the Applicant Matco Investment Ltd., pursuant to the terms of the Shareholders' Agreement (the "USA") and the Limited Partnership Agreement;
>
> (d) an order confirming, if regarded as necessary, the authority of 1358846 to appoint Pivotal Projects Inc. ("Pivotal") as the new construction manager for the Project on appropriate terms.

2 By Notice of Motion filed July 15, 2010, SMBI and, by implication, its affiliate The Statesman Group of Companies Ltd. ("Statesman Group") (collectively, "Statesman") cross-applied for:

> (a) a declaration confirming that SRQL remains the General Partner of the Partnership, with Garth Mann having a casting vote in the event of deadlock in construction matters; and
>
> (b) a declaration confirming that SMBI remains the Manager of the Project.

Statesman purported to make such applications on behalf of SRQL. Matco submits that Statesman lacked the proper authority to do so.

3 The receivership motion was initially argued in part on July 15 and 19, 2010. On July 19, Statesman announced that construction of the Project had been voluntarily halted and undertook that it would not recommence construction without court order. The motions and cross-motions were further adjourned to August 18, 2010 pending the filing of additional affidavits by Statesman and cross-examinations on those and prior affidavits.

4 By further Notice of Motion filed August 6, 2010, SMBI applied to stay the action as it relates to matters dealing with the DMA and to appoint an arbitrator to determine such matters.

5 After hearing submissions on August 18, 2010, I advised the parties that I was not satisfied that there were not remedies short of a receivership that could protect the interests of the Applicants, and directed them to participate in a Judicial Dispute

Resolution before a Justice of this Court. The Judicial Dispute Resolution was held on September 8, 2010 by Macleod, J. but did not resolve matters between the parties.

Analysis

A. Should a Receiver be Appointed?

6 Counsel for Matco conceded both on July 19, 2010 and on August 18, 2010 that Statesman's undertaking not to recommence construction without court order rendered the appointment of a receiver and manager unnecessary in the short term. Matco continues to take the position that, as long as construction does not resume while the issues between the parties are determined and as long as transitional matters that arise from these determinations can be effected cooperatively, a receiver and manager is not necessary.

7 Statesman, however, does not agree that it should continue to be bound by its undertaking not to recommence construction in the long term and submits that the application for a receiver should be dismissed and the Court should authorize Statesman to carry on with the financing and development of the Project as soon as possible.

8 Matco applied for the appointment of a receiver pursuant to certain provisions of the *Alberta Rules of Court*, certain provisions of the *Business Corporations Act*, R.S.A. 2000, c. B-9 and Section 13(2) of the *Judicature Act*, R.S.A. 2000, c.J-2.

9 Given the acknowledgement by Matco that a receiver is not necessary as long as construction on the project does not recommence, it is not necessary to analyze the law with respect to the appointment of a receiver, except to recognize that Matco's concession in that regard is consistent with the principle that a court considering the appointment of a receiver must carefully explore whether there are other remedies short of a receivership that could serve to protect the interests of the applicant. The potentially devastating effects of granting the receivership order must always be considered, and, if possible, a remedy short of receivership should be used: *BG International Ltd. v. Canadian Superior Energy Inc.*, 2009 CarswellAlta 469 (Alta. C.A.) at paras. 16 & 17; *BG International Ltd. v Canadian Superior Energy Inc.*, [unreported, February 9, 2009] (Alta. Q.B.).

10 While the conduct of a debtor's business rests in the receiver upon appointment and thus the Applicants would be protected from further alleged breaches if a receivership order was granted, they acknowledge that the cessation of construction that occurred as a result of the voluntary undertaking served the same purpose and is an adequate remedy in their view. The question, therefore, becomes less whether a receiver should be appointed and more whether the voluntary undertaking to cease construction should be replaced by a court-imposed injunction restraining Statesman from further construction on the Project pending the resolution of matters between the parties.

11 As has been noted in *Anderson v. Hunking*, [2010] O.J. No. 3042 (Ont. S.C.J.) at para. 15, the test for the appointment of a receiver is comparable to the test for injunctive relief. Determining whether it is "just and convenient" to grant a receivership requires the court to consider and attempt to balance the rights of both the applicant and the respondent, with the onus on the applicant to establish that such an order is required: *BG International* at para. 17. The factors set out to be considered in a receivership application are focused on the same ultimate question that the court must determine in considering an application for an interlocutory injunction: what are the relative risks to the parties of granting or withholding the remedy?

B. Injunctive Relief

12 The test for interlocutory injunctive relief is set out by the Supreme Court in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.) at paras. 47-48, 62-64, (1994), 111 D.L.R. (4th) 385 (S.C.C.), as follows:

> (i) a preliminary assessment must be made of the merits of the case to ensure that there is a serious issue to be tried;
>
> (ii) it must be determined that the moving party would suffer "irreparable harm" if the motion is refused and;
>
> (iii) an assessment must be made to determine which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits - that is, the "balance of convenience."

TAB 8

2009 ABCA 127
Alberta Court of Appeal

BG International Ltd. v. Canadian Superior Energy Inc.

2009 CarswellAlta 469, 2009 ABCA 127, [2009] A.W.L.D. 1936, [2009] A.W.L.D. 1973, [2009] A.J. No. 358, 177 A.C.W.S. (3d) 41, 457 A.R. 38, 457 W.A.C. 38, 53 C.B.R. (5th) 161, 71 C.P.C. (6th) 156

BG International Limited (Respondent / Plaintiff) and Canadian Superior Energy Inc. (Appellant / Defendant)

R. Berger, F. Slatter, P. Rowbotham JJ.A.

Heard: March 10, 2009
Judgment: April 7, 2009
Docket: Calgary Appeal 0901-0048-AC

Counsel: V.P. Lalonde, M.A. Thackray, Q.C. for Appellant
C.L. Nicholson, M.E. Killoran for Respondent
T.S. Ellam for Interested / Affected Party, Challenger Energy Corp.
H.A. Gorman for Interested / Affected Party, Canadian Western Bank
L.B. Robinson, Q.C for Receiver, Deloitte & Touche Inc.

Subject: Corporate and Commercial; Natural Resources; Contracts; Insolvency; Civil Practice and Procedure

Headnote

Debtors and creditors --- Receivers — Appointment — General principles

Defendant was operator of well and plaintiff paid its share of invoice of M, which was operator of semi-submersible rig, to defendant, but funds were not forwarded to M — Plaintiff commenced arbitration proceedings under joint operating agreement and obtained order from chambers judge appointing interim receiver to take control of oil well pending hearing of arbitration — Defendant appealed decision appointing interim receiver — Appeal dismissed — Real risk existed that M would remove rig and it was in interests of all parties that rig stay on well and that well be flow-tested — Defendant was in default and was unable to cure this, and plaintiff did not dispute its obligation to pay defendant's share of operating expenses — Extending to plaintiff protection of receiver's certificates was not unreasonable exercise of chamber judge's discretion and no evidence existed showing that this created any serious prejudice to defendant — Practical effect of accelerating removal of defendant as operator of well was apparent since it did not have funds to cure its defaults, and this removal merely accelerated inevitable and did not cause it significant prejudice.

Natural resources --- Oil and gas — Exploration and operating agreements — Joint operating agreement

Interim receiver — Defendant was operator of well and plaintiff paid its share of invoice of M, which was operator of semi-submersible rig, to defendant, but funds were not forwarded to M — Plaintiff commenced arbitration proceedings under joint operating agreement and obtained order from chambers judge appointing interim receiver to take control of oil well pending hearing of arbitration — Defendant appealed decision appointing interim receiver — Appeal dismissed — Real risk existed that M would remove rig and it was in interests of all parties that rig stay on well and that well be flow-tested — Defendant was in default and was unable to cure this, and plaintiff did not dispute its obligation to pay defendant's share of operating expenses — Extending to plaintiff protection of receiver's certificates was not unreasonable exercise of chamber judge's discretion and no evidence existed showing that this created any serious prejudice to defendant — Practical effect of accelerating removal of defendant as operator of well was apparent since it did not have funds to cure its defaults, and this removal merely accelerated inevitable and did not cause it significant prejudice.

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Roberts v. R. (2002), 2002 CarswellNat 3438, 2002 CarswellNat 3439, (sub nom. *Wewaykum Indian Band v. Canada)* 2002 SCC 79, (sub nom. *Wewaykum Indian Band v. Canada)* [2003] 1 C.N.L.R. 341, (sub nom. *Wewaykum Indian Band v. Canada)* 220 D.L.R. (4th) 1, (sub nom. *Wewayakum Indian Band v. Canada)* 297 N.R. 1, (sub nom. *Wewaykum Indian Band v. Canada)* [2002] 4 S.C.R. 245, (sub nom. *Wewayakum Indian Band v. Canada)* 236 F.T.R. 147 (note) (S.C.C.) — referred to

Royal Bank v. W. Got & Associates Electric Ltd. (1999), 178 D.L.R. (4th) 385, 1999 CarswellAlta 892, 1999 CarswellAlta 893, 247 N.R. 1, 73 Alta. L.R. (3d) 1, [2000] 1 W.W.R. 1, 250 A.R. 1, 213 W.A.C. 1, [1999] 3 S.C.R. 408, 15 P.P.S.A.C. (2d) 61 (S.C.C.) — referred to

Swiss Bank Corp. (Canada) v. Odyssey Industries Inc. (1995), 30 C.B.R. (3d) 49, 1995 CarswellOnt 39 (Ont. Gen. Div. [Commercial List]) — considered

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — referred to

Judicature Act, R.S.A. 2000, c. J-2

Generally — referred to

APPEAL by operator of oil well of decision appointing interim receiver.

***Per curiam*:**

1 This is an appeal of a decision appointing an interim receiver to take control of the Endeavour oil well located off the coast of Trinidad and Tobago. The appeal was dismissed following oral argument, with reasons to follow.

Facts

2 The appellant and the respondent both have an interest in the well. The appellant is the operator of the Endeavour well under the standard form joint operating agreement approved by the Association of International Petroleum Negotiators. While Challenger Energy Corp. is a party to the joint operating agreement, there is some dispute as to whether Challenger has effectively acquired a part of the appellant's interest, which would trigger its obligations.

3 There is at present a semi-submersible rig working on the well. The rig is operated by Maersk Contractors Services on behalf of the owners of the rig. All the parties agree that it is extremely important that the rig is not removed from the well, and that the well be flow tested. Maersk sent its invoice for its November operations. The respondent paid its share of the invoice to the appellant, but those funds were not forwarded to Maersk. Once the invoice became overdue, Maersk commenced the process under the drilling contract that would allow it to terminate the contract.

4 When the respondent found out that Maersk had not been paid, it became very concerned. It deposes that operating funds were not being kept in a segregated account as covenanted. It deposes that the appellant is in default of its obligations by not paying Maersk. The appellant does not dispute that Maersk has not been paid. It proposed a payment schedule to Maersk (which Maersk rejected), which is essentially an acknowledgment that payments are overdue.

5 The respondent commenced arbitration proceedings in accordance with the joint operating agreement. It then immediately applied to the Court of Queen's Bench for interim relief pending the hearing of the arbitration, as contemplated by Article 18.2 (C)(9) of the arbitration clause. The application for an interim receiver was brought on very quickly. The Canadian Western Bank, which held security over the appellant's assets, was given notice and appeared. While the appellant was also given notice of and appeared at the application, it did not have time to file an affidavit in response nor to cross examine on the respondent's affidavit. An adjournment to do that was denied, and the interim receiver was appointed on February 11th, 2009. The order protected the priority of the Canadian Western Bank, and gave second priority to the respondent's advances. This appeal was promptly launched and expedited.

13 The default clause in the joint operating agreement provides in Article 18.4 (H) that it is not intended to exclude any other remedies available to the parties. The enhanced security collaterally obtained by the respondent through the use of receiver's certificates has not been shown on this record to create any serious prejudice to the appellant. After all, it is the appellant that is in default, and the respondent is prepared to advance significant sums to cure that default, even if it is required to do so by the contract. The chambers judge found that the appellant had been commingling joint venture funds, and that the respondent had a reasonable concern about the protection of future advances. Unlike in most receivership cases, the funds advanced under this enhanced security are to be used to pay other creditors, and would not further subordinate their interests. The security of the receiver's certificates may merely be parallel to that already provided for in the operating agreement. While the appointment of the receiver does arguably have the effect identified by the appellant, that does not make the receivership order unreasonable in the circumstances.

14 The appellant also points out that the appointment of the interim receiver has had the effect of displacing it as the operator. While the respondent has initiated the procedure under Article 4 of the joint operating agreement to replace the appellant as operator because of its default, the mechanism provided for in the agreement would take at least 30 days. By applying for an interim receiver, the respondent has essentially accelerated that period of time during which the appellant could cure its default, and maintain its status as operator. Again, this submission of the appellant is not without substance. We note, firstly, that the appellant has not offered to cure its default, and indeed it appears it is unable to do so. We are advised by counsel that last Thursday the appellant was granted protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36. If the appellant was now in a position to cure its defaults, this point might be determinative of the appeal. Secondly, the parties had already agreed that the respondent should become the operator in April of this year. There is no significant prejudice to the appellant by the brief acceleration.

15 The appellant complains that the respondent was not required to post an undertaking to pay damages if it turns out its allegations are unfounded. Filing an undertaking in these circumstances is not the usual practice in Alberta. Damages for wrongful appointment of a receiver were granted in *Royal Bank v. W. Got & Associates Electric Ltd.*, [1999] 3 S.C.R. 408 (S.C.C.) without the presence of an undertaking. We note that the respondent has paid significant sums of money on behalf of the appellant, and that the appellant would likely have a right of set-off if it obtains an award of damages against the respondent. An undertaking would add little.

Conclusion

16 We agree that the appointment of a receiver is a remedy that should not be lightly granted. The chambers judge on such an application should carefully explore whether there are other remedies, short of a receivership, that could serve to protect the interests of the applicant. For example, the order might be granted but stayed for, say, 48 hours to allow the company to cure deficiencies, propose alternatives, or clarify the record.

17 In particular, the chambers judge must carefully balance the rights of both the applicant and the respondent. The mere appointment of a receiver can have devastating effects. The respondent referred us to the statement in *Swiss Bank Corp. (Canada) v. Odyssey Industries Inc.* (1995), 30 C.B.R. (3d) 49 (Ont. Gen. Div. [Commercial List]) at para. 31:

> [31] With respect to the hardship to Odyssey and Weston should a receiver be appointed, I am unable to find any evidence of undue or extreme hardship. Obviously the appointment of a receiver always causes hardship to the debtor in that the debtor loses control of its assets and business and may risk having its assets and business sold. The situation in this case is no different.

This quotation does not reflect the law of Alberta. Under the *Judicature Act*, it must be "just and convenient" to grant a receivership order. Justice and convenience can only be established by considering and balancing the position of both parties. The onus is on the applicant. The respondent does not have to prove any special hardship, much less "undue hardship" to resist such an application. The effect of the mere granting of the receivership order must always be considered, and if possible a remedy short of receivership should be used.

TAB 9

2013 ABQB 63
Alberta Court of Queen's Bench

Kasten Energy Inc. v. Shamrock Oil & Gas Ltd.

2013 CarswellAlta 153, 2013 ABQB 63, [2013] A.W.L.D. 1334, [2013] A.W.L.D. 1378, 20 P.P.S.A.C. (3d) 128, 225 A.C.W.S. (3d) 1018, 555 A.R. 305, 76 Alta. L.R. (5th) 407, 99 C.B.R. (5th) 178

Kasten Energy Inc. Applicant and Shamrock Oil & Gas Ltd. Respondent

Donald Lee J.

Heard: November 29, 2012
Judgment: January 24, 2013
Docket: Edmonton 1203-15035

Counsel: Terrence M. Warner for Applicant
Brian W. Summers for Respondent

Subject: Corporate and Commercial; Natural Resources; Property; Insolvency
Related Abridgment Classifications
Debtors and creditors
VII Receivers
VII.3 Appointment
VII.3.a General principles
Natural resources
III Oil and gas
III.5 Oil and gas leases
III.5.h Transfer of title
Headnote
Debtors and creditors --- Receivers — Appointment — General principles
Company K was involved in business of exploring and developing oil and gas — Company S had petroleum and natural gas lease used to develop oil well — K was successor in interest to company P — S entered into contract with P, which required P to construct road to S's well site — Following services provided under contract, S became indebted to P in principal amount of $567,267.76, plus interest at rate of 24 percent per annum — By Debt Assignment Agreement, P assigned S's outstanding debt, along with underlying security, to K — K brought application seeking order for appointment of receiver and manager of S's assets and undertaking — Application granted — Appointment of receiver and manager was just for circumstances of case — S's oil and gas lease was proprietary interest and was transferable and fell within power and authority of court-appointed receiver.
Natural resources --- Oil and gas — Oil and gas leases — Transfer of title
Company K was involved in business of exploring and developing oil and gas — Company S had petroleum and natural gas lease used to develop oil well — K was successor in interest to company P — S entered into contract with P, which required P to construct road to S's well site — Following services provided under contract, S became indebted to P in principal amount of $567,267.76, plus interest at rate of 24 percent per annum — By Debt Assignment Agreement, P assigned S's outstanding debt, along with underlying security, to K — K brought application seeking order for appointment of receiver and manager of S's assets and undertaking — Application granted — Appointment of receiver and manager was just for circumstances of case — S's oil and gas lease was proprietary interest and was transferable and fell within power and authority of court-appointed receiver.
Table of Authorities
Cases considered by *Donald Lee J.*:

Amoco Canada Resources Ltd. v. Amax Petroleum of Canada Inc. (1992), 2 Alta. L.R. (3d) 168, 127 A.R. 155, 20 W.A.C. 155, [1992] 4 W.W.R. 499, 1992 CarswellAlta 53, 1992 ABCA 93 (Alta. C.A.) — referred to

BG International Ltd. v. Canadian Superior Energy Inc. (2009), 2009 CarswellAlta 469, 2009 ABCA 127, 53 C.B.R. (5th) 161, 71 C.P.C. (6th) 156, 457 A.R. 38, 457 W.A.C. 38 (Alta. C.A.) — considered

Highway Properties Ltd. v. Kelly, Douglas & Co. (1971), 1971 CarswellBC 274, [1972] 2 W.W.R. 28, 17 D.L.R. (3d) 710, 1971 CarswellBC 239, [1971] S.C.R. 562 (S.C.C.) — referred to

Lindsey Estate v. Strategic Metals Corp. (2010), 2010 CarswellAlta 641, 67 C.B.R. (5th) 88, 2010 ABQB 242 (Alta. Q.B.) — referred to

Lindsey Estate v. Strategic Metals Corp. (2010), 495 W.A.C. 262, 487 A.R. 262, 27 Alta. L.R. (5th) 241, 69 C.B.R. (5th) 42, 2010 CarswellAlta 1049, 2010 ABCA 191 (Alta. C.A.) — referred to

Paragon Capital Corp. v. Merchants & Traders Assurance Co. (2002), 2002 CarswellAlta 1531, 2002 ABQB 430, 316 A.R. 128, 46 C.B.R. (4th) 95 (Alta. Q.B.) — considered

Philip's Manufacturing Ltd., Re (1992), 69 B.C.L.R. (2d) 44, 92 D.L.R. (4th) 161, [1992] 5 W.W.R. 549, 12 C.B.R. (3d) 149, (sub nom. *Philip's Manufacturing Ltd. v. Coopers & Lybrand Ltd.)* 15 B.C.A.C. 247, (sub nom. *Philip's Manufacturing Ltd. v. Coopers & Lybrand Ltd.)* 27 W.A.C. 247, 1992 CarswellBC 490 (B.C. C.A.) — referred to

Romspen Investment Corp. v. Hargate Properties Inc. (2011), 2011 ABQB 759, 2011 CarswellAlta 2133, 86 C.B.R. (5th) 49 (Alta. Q.B.) — referred to

Saulnier (Receiver of) v. Saulnier (2008), (sub nom. *Saulnier (Bankrupt), Re)* 271 N.S.R. (2d) 1, 48 C.B.R. (5th) 159, (sub nom. *Saulnier v. Royal Bank of Canada)* [2008] 3 S.C.R. 166, (sub nom. *Saulnier (Bankrupt), Re)* 867 A.P.R. 1, 13 P.P.S.A.C. (3d) 117, (sub nom. *Royal Bank of Canada v. Saulnier)* 298 D.L.R. (4th) 193, 2008 SCC 58, 2008 CarswellNS 569, 2008 CarswellNS 570, (sub nom. *Saulnier (Bankrupt), Re)* 381 N.R. 1, 50 B.L.R. (4th) 1 (S.C.C.) — considered

Stout & Co. LLP v. Chez Outdoors Ltd. (2009), 2009 ABQB 444, 2009 CarswellAlta 1158, 15 P.P.S.A.C. (3d) 224, 478 A.R. 316, 56 C.B.R. (5th) 250, 9 Alta. L.R. (5th) 366, [2009] 10 W.W.R. 474 (Alta. Q.B.) — considered

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

Pt. III, Div. I — referred to

s. 2 "property" — referred to

s. 50.4 [en. 1992, c. 27, s. 19] — referred to

s. 244 — referred to

Judicature Act, R.S.A. 2000, c. J-2

s. 13(2) — considered

Personal Property Security Act, R.S.A. 2000, c. P-7

Generally — referred to

s. 4(f) — referred to

Personal Property Security Act, S.N.S. 1995-96, c. 13

Generally — referred to

APPLICATION seeking order for appointment of receiver and manager of company's assets and undertaking.

Donald Lee J.:

Introduction

Kasten's Submissions

14 The Applicant submits that the evidence before this Court is that since the Proposal was approved, the expenses on Shamrock's well production have exceeded revenues by a substantial margin such that it's unlikely that Shamrock would be able to pay the outstanding indebtedness in a timely manner. The revenue accruing from the Sawn Lake Well, which is Shamrock's primary asset, has not been directed at paying the debt owed Kasten.

15 Kasten contends that it has the right to appoint a Receiver under the GSA (at para 8.2. It notes that on the basis of the evidence in this case, Shamrock is insolvent and this situation is not improving. The risk of waste under the joint operating agreement is palpably real as Stout is spending substantial amount of money as expenses for well operations while channelling revenues in a selective manner. Kasten submits that irreparable harm may result if a Receiver is not appointed, pending judicial resolution of this matter, to properly manage and preserve the value of the well and its associated lease, as well as to distribute revenues equitably to all interested parties.

16 Kasten argues that the balance of convenience favours the appointment of a Receiver who would be better positioned to distribute revenues equitably to all interested parties and creditors since Shamrock is unable to comply with the payment schedule. Kasten reiterates that nothing demonstrates its good faith in pursuit of its legitimate interest to get paid the debt owed more than the patience it has displayed towards Shamrock for nearly two years.

17 The Applicant notes that Shamrock's argument on the issue of whether the GSA covers the oil and gas in the ground along with the right to extract the minerals distracts from the main issue of whether this Court should appoint a Receiver in the circumstances of this matter. Kasten argues that there is no doubt that a Crown oil-and-gas lease is a contract that contains a profit à prendre, which is an interest in land: *Amoco Canada Resources Ltd. v. Amax Petroleum of Canada Inc.*, 1992 ABCA 93 (Alta. C.A.); at para 10, [1992] 4 W.W.R. 499 (Alta. C.A.). Nevertheless, leases have a dual nature as both a conveyance and a commercial contract; and as such, are subject to normal commercial principles: *Highway Properties Ltd. v. Kelly, Douglas & Co.*, [1971] S.C.R. 562 (S.C.C.), at 576, (1971), [1972] 2 W.W.R. 28 (S.C.C.). The contract is assignable and subject to seizure.

Shamrock's Submissions

18 The Respondent Shamrock submits that Kasten has not demonstrated that irreparable harm may result if this Court refuses to appoint a Receiver. Instead, Stout has injected huge sums of money to improve the revenue potential of the Sawn Lake Well. Shamrock contends that if a Receiver is appointed, Stout may cease funding operations and oil and gas production will cease. Further, Shamrock says that it had also initiated a sale process and does not perceive any risk to Kasten while waiting for the completion of that process.

19 Shamrock argues that by nature, the property involved in this case calls for a continuous operation by Stout and itself that are better equipped in developing and operating oil well than a Receiver, probably unfamiliar with the oil business. It notes that the Sawn Lake Well cannot be moved from its present location and there is no evidence of waste regarding the well. Shamrock apprehends that Kasten's motivation is "not a good faith pursuit of repayment of debt, but rather an attempt to obtain the Sawn Lake Well."

Should a Receiver be Appointed in this Case?

20 The Alberta Court of Appeal notes in *BG International Ltd. v. Canadian Superior Energy Inc.*, 2009 ABCA 127 (Alta. C.A.) at paras 16-17 that a remedial Order to appoint a Receiver "should not be lightly granted" and the chambers judge should: (i) carefully explore whether there are other remedies, short of a receivership, that could serve to protect the interests of the applicant; (ii) carefully balance the rights of both the applicant and the respondent; and (iii) consider the effect of granting the receivership order, and if possible use a remedy short of receivership.

21 The security documentation in the present case authorizes the appointment of a Receiver (GSA, para 8.2). Thus, even if I accept the argument that the Applicant Kasten has not been able to demonstrate irreparable harm, that itself would not be determinative of whether or not a Receiver should be appointed in this matter. It is not essential for a creditor to establish irreparable harm if a receiver is not appointed: *Paragon Capital* at para 27. I am also not persuaded by Shamrock's suggestion that it is probable that Stout may cease funding its operations and this development would result in irreparable harm which may be avoided by the Court's refusal to appoint a Receiver. In my view, such a cessation of funding by Stout would likely amount to a breach under the joint operating agreement and Shamrock could accordingly, seek appropriate remedy. This factor or consideration should not stand in the way of an appointment of a Receiver, if it is otherwise just to do so.

22 Shamrock objects to the appointment of a Receiver based on the nature of the property and the probability that a court-appointed Receiver may lack familiarity with oil well development and operation. However, this concern is not insurmountable, given the broad management authority and discretion that a court-appointed Receiver would possess to enable it do everything positively necessary to ensure that the operation of the relevant oil well continues in a productive and efficient manner.

23 In terms of apprehended or actual waste, there is no concrete evidence before this Court one way or the other. However, it is apparent that Shamrock has not made any substantial payments to Kasten from the alleged revenues flowing from the operation and production in the Sawn Lake Well. This situation also ties in to one of the factors that this court should consider, i.e. whether the manner in which Shamrock is making payments to Kasten (as a security-holder) forms a reasonable basis for Kasten to expect that it would encounter difficulty with Shamrock (as the debtor). Kasten contends that it is critical that there is no evidence before this Court to demonstrate the veracity of the claim that the Sawn Lake Well is generating the alleged production; and neither is there any evidence as to where the alleged revenues accruing from the production is being diverted.

24 In my view, the approach which Shamrock has adopted in paying the debts owed to Kasten seems to be a justifiable basis for Kasten's apprehension that it would likely and ultimately encounter difficulties with Shamrock. And based on this ground, it would be inaccurate to characterize Kasten's tenacious pursuit of Shamrock for its indebtedness as an activity motivated by bad faith, as Shamrock alleges.

25 Shamrock states that it had initiated a sale of Sawn Lake Well. At this point however, there is no indication that Shamrock's initiative or endeavour is moving ahead in a positive manner. After the chambers application before me on November 29, 2012, Mr. Nathan Richter (on behalf of Stout) sent a letter dated December 14, 2012 to Kasten (see, attachment to Shamrock's supplemental brief filed Dec. 14, 2012). The letter indicated that four postdated cheques were sent to Kasten as payments of monthly interests until March, 2013 and pending the anticipated sale of Sawn Lake Well in April, 2013. Mr. Richter also confirmed in the letter that no formal bids were received as at the bid deadline date of December 12, 2012.

26 After carefully considering whether there are other remedies, short of a receivership, that could serve to protect the interests of the Applicant in this matter and also carefully balancing the rights and interests of both Kasten and Shamrock, I have come to the conclusion that a remedial Order to appoint a Receiver and Manager is just, convenient and appropriate in the circumstances of the developments and delays in this matter.

Is Shamrock's Oil and Gas Lease Covered by the GSA?

27 Kasten submits that while the GSA is not directly enforceable against the oil and gas under (or in) the ground, once the oil and gas comes out of the ground and captured by Shamrock it becomes subject to the GSA in much the same manner as the production facilities that are clearly covered by the GSA. It agrees that the oil and gas lease contains a *profit à prendre*, but submits that the right of Shamrock to extract oil and gas as granted by the Crown is transferable.

TAB 10

1992 CarswellOnt 474
Ontario Court of Justice (General Division), Commercial List

Confederation Trust Co. v. Dentbram Developments Ltd.

1992 CarswellOnt 474, [1992] O.J. No. 3870, 9 C.P.C. (3d) 399

CONFEDERATION TRUST COMPANY v. DENTBRAM DEVELOPMENTS LTD., AMNON ALTSCHULER GORDON COBB, OAKBRUM INVESTMENTS LIMITED and THE TORONTO-DOMINION BANK

Borins J.

Judgment: April 24, 1992
Docket: Doc. 92-CQ-8560CM

Counsel: *Michael McGowan* and *Kevin J. Zych*, for plaintiff.
Harvey M. Mandel, for defendants Dentbram Developments Ltd. and Amnon Altschuler.
Theodore Nemetz, for defendant Gordon Cobb.

Subject: Civil Practice and Procedure; Corporate and Commercial
Related Abridgment Classifications
Debtors and creditors
VII Receivers
VII.3 Appointment
VII.3.b Application for appointment
VII.3.b.i General principles
Debtors and creditors
VII Receivers
VII.3 Appointment
VII.3.b Application for appointment
VII.3.b.ii Person entitled to make application
VII.3.b.ii.B Creditor

Headnote

Receivers --- Appointment — Application for appointment — General
Receivers --- Appointment — Application for appointment — Person entitled to make application — Creditor
Receivers — Application for appointment of receiver — Mortgage providing for appointment of receiver — Default occurring — Just and equitable to appoint receiver.
Receivers — Persons entitled to apply — Creditors — Default occurring under mortgage — Choice of receiver being choice of creditor.
Pursuant to a mortgage, the plaintiff was entitled to appoint a receiver in the event of default. After the defendant defaulted under the mortgage, the plaintiff unsuccessfully attempted to take steps to protect the property ad realize the debt owing. The plaintiff moved for the appointment of a receiver.

Held:

The motion was granted.

Although the appointment of a receiver was a discretionary remedy and one that ought not to be exercised lightly, in this case it would be just an equitable to appoint a receiver. Where receivers were suggested by both parties, an the receivers possessed similar qualities, generally the receiver suggested by the creditor, who had carriage of the proceedings, should be appointed.

Motion for appointment of receiver.

Borins J.:

1 I appreciate that the appointment of a receiver is a discretionary remedy and that the court ought not lightly to exercise it discretion to appoint a receiver. However, on the evidence before me, I am satisfied that it is just and equitable that a receiver be appointed. The plaintiff has demonstrated that its right under the mortgage to take steps to preserve the property and to obtain the benefits of the property in the realization of its debt have proved to be ineffective. As well, in consideration what is fair and equitable, I have taken into consideration that the mortgage contract contains an express covenant in which the mortgagee agrees to the appointment of a receiver in the event of default, and default has, of course, occurred. I my view, the appointment of a receiver is required, inter alia, for the reasons contained in para. 20 of the plaintiff's original factum.

2 The mortgagor has not provided any evidence why Price Waterhouse, the receiver proposed by the by the plaintiff, should not be appointed. I am satisfied that Price Waterhouse is impartial, disinterested and able to deal with the rights of all interested parties in a fair manner. When receivers proposed by each party possess similar qualities, generally speaking he receiver proposed by the creditor, who has carriage of the proceedings, should be appointed.

3 In he result, a order is to issue pursuant to the order as amended contained in Sched. "A" to the notice of motion which I have placed my fiat.

Motion granted.

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